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JUDICIAL REVIEW OF EXPULSION BY A DOMESTIC TRIBUNAL

THE increasing tendency in the modern State to organise the conditions under which a person may enter into and pursue a particular profession or occupation has resulted in great powers being vested in the controlling bodies. These powers may extend not only to the imposition of penalties by way of fines for breach of the rules laid down but even to expulsion resulting in the deprivation of a man's livelihood. In some cases the controlling body is created by statute and its jurisdiction will then necessarily depend upon its statutory powers. More often, however, the body in question will be a purely voluntary organisation whose powers will rest solely upon the agreement, express or implied, of the members. Accordingly, where questions arise as to what powers such a body possesses, whether they have been properly exercised, in what circumstances the court will intervene, and, in the event of such intervention, what remedies are to be granted to an aggrieved member, recourse is had to those general branches of law comprised under the headings of contract, property and tort. Unfortunately, those well-known categories seem to lack the necessary degree of flexibility for dealing with this sort of situation, so that it must often happen that a person who is unjustly expelled from his profession or occupation is left entirely without legal remedy. It is true that so far as this country is concerned, this class of problem has not often been before the courts, but this may well be due to the ineffectualness of the legal remedies and the inevitable tendency, clearly apparent throughout the whole range of labour relations and collective bargaining, to regulate such disputes by domestic and private arrangements without resorting to the courts. It has recently been decided that in any event no recourse to the courts may be had until all the domestic remedies under the rules have been exhausted (*White* v. *Kuzych* [1951] 2 All E.R. 435),[1] and in those rare cases where litigation ensues the result is not usually satisfactory to the aggrieved plaintiff.

In a previous article in this review [2] an attempt was made to

[1] See, on this case, article by Prof. Whitmore in (1952) 30 C.B.R., pp. 1 *et seq.*
[2] "Disciplinary Powers of Professional Bodies," in (1950) 13 M.L.R., pp. 281 *et seq.*

argue that though some of the reported cases (especially the earlier ones) had tended to stress that the intervention of the court could only be based on an interference with the member's right of property, the trend of some of the later decisions has been in the direction of recognising that such intervention could also be based upon the infringement of a contractual right, and that in most instances the society's rules would constitute the terms of the contract between the aggrieved members and the other members, a breach of which would warrant judicial intervention. It was further suggested that, although contract provided a much more satisfactory basis for judicial review than property, it still remained an insufficiently flexible category to produce an adequate solution in many cases, and that while an action in tort might be found more appropriate for this purpose there was little prospect of the judicial extension of tortious liability to meet the situation. Further light has since been thrown on all these matters by two important recent decisions of the Court of Appeal,[3] and it is proposed in this article to examine these decisions in some detail in an endeavour to elucidate the stage of development which has now been reached in this increasingly important legal field.

In the earlier of these two cases [4] the plaintiff was a corn porter employed in the London Docks, and a member of a committee formed to protect the interests of corn porters. This committee apparently possessed no written constitution whatever but it wielded *de facto* jurisdiction over corn porters, and it exercised control by the infliction of fines and by its power to remove a corn porter from a register kept by the committee. The effect of such removal was that the person in question could not act as a corn porter in the Port of London. Complaints were made against the plaintiff by certain members of the gang of porters under his charge, and he was summoned to attend a meeting of the committee. The meeting was convened by one Platt, an officer of the men's trade union with which the committee worked in close association. At the meeting, which Platt attended in an advisory capacity, the plaintiff was fined. Immediately after the meeting the plaintiff followed Platt into the street and struck him. Platt thereupon convened an emergency meeting of the committee at which it was resolved that the plaintiff's name should be removed from the register. The plaintiff brought an action against (*inter alios*) two members of the committee and Platt. He alleged that the resolution passed at the emergency meeting was invalid, and claimed a declaration to that effect and also an injunction restraining the defendants from acting upon the resolution; he also claimed against

[3] *Abbott* v. *Sullivan* [1952] 1 All E.R. 226; *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 All E.R. 1175.
[4] *Abbott* v. *Sullivan, ut supra.*

the committee members [5] damages for wrongfully removing his name from the register and against Platt for wrongfully procuring his removal.

The trial judge held that the resolution was *ultra vires* and invalid but declined to grant an injunction. He further held that no damages could be awarded as the defendants did not act maliciously, and he "could not see any legal peg on which to hang" such an award. The plaintiff appealed, and before the appeal was heard his name was, in fact, restored to the register. On the appeal, therefore, the only substantial issue was the question of damages. It was held by Sir Raymond Evershed M.R. and Morris L.J. (Denning L.J. dissenting) that no damages were recoverable.

The Master of the Rolls pointed out that both the powers of the committee and the rights of the plaintiff-member must depend in law on the existence of some express or implied contract made between each and every corn porter and every member of the committee. Thus, in a case such as this, where the plaintiff sought to recover damages he would have to establish an implied contractual term, *e.g.*, to the effect that a corn porter would not be excluded save for the breach of a specific rule, or, perhaps, to the effect that the committee, having knowledge of the material facts, would not act in excess of its contractual jurisdiction. Unfortunately, however, the case was apparently—notwithstanding the "long and much amended statement of claim"—not pleaded in this way, and one may indeed feel some sympathy with the learned pleader seeking to make his way through what Denning L.J. described as an "uncharted area on the borderland of contract and of tort" (p. 235). From the point of view of the clarification of this obscure branch of law the particular misfortune is, that it is difficult to say how much the case really decides and how far it turned on a question of pleading. Sir Raymond Evershed M.R. did, however, indicate that he was not satisfied that any such implied term could be inferred, and that he doubted whether there was any real analogy with the club cases, though he refrained from expressing a final view.

Morris L.J. (in whose judgment the Master of the Rolls concurred) also thought that the claim for damages must be founded upon a contract express or implied. There was no suggestion of an express contract, and it was "hardly appropriate that an appellate court should be left to grope for implied terms when none have been specified" (p. 240). Further, apart from the question of pleading, the learned Lord Justice was of opinion that the facts as proved did not warrant the conclusion that any such implied term could be inferred. On the possible existence of liability in tort,

[5] It is clear that damages could not have been recovered from the association itself, even if it were a society, such as a registered trade union, which could be sued in its collective name (*Kelly* v. *N.S.O.P.A.* (1915) 113 L.T. 1055).

Morris L.J. held that even if the categories of tort are not closed, there seemed no basis for framing a claim for mere wrongful expulsion in tort, though the position might be different if there was evidence of malice or of a conspiracy to injure.

In his dissenting judgment, holding that the claim to damages had been made out, Denning L.J. rejected the argument for tortious liability in the absence of proof of conspiracy. The learned Lord Justice referred to the oft-quoted statement that it is an actionable wrong intentionally to injure another without just cause or excuse (*e.g.*, *per* Bowen L.J. in *Mogul S.S.* v. *McGregor Gow*, 23 Q.B.D. at p. 613), but thought that such a broad proposition had not yet been accepted into our law. Denning L.J., however, was of opinion that the claim could be founded on contract, and he saw an analogy with the cases dealing with statutory tribunals wherein it had been held that if such a tribunal acted in excess of its jurisdiction, when it ought to have known on the facts before it that it had no such jurisdiction, then it might be liable in damages for injury inflicted upon the plaintiff. By analogy a tribunal whose jurisdiction is merely contractual should be subject to an implied term similar in effect to the limitation thus imposed on statutory tribunals.[6] Denning L.J. also thought that in a complex case of this sort it was enough if the pleader stated the facts sufficiently to enable the court to say what was the implied term which the law would annex to the contract.[7] In this instance he thought the facts as pleaded and proved established that there had been a breach of an implied contractual term and that, accordingly, an inquiry as to damages should be ordered.

If an attempt may be made to summarise the effect of this part of the case, it would seem that there was substantial agreement between all the members of the Court of Appeal. As regards *tort*, all three Lords Justices were of opinion that a mere wrongful expulsion from a voluntary organisation did not give rise to tortious liability.[8] The element of conspiracy might give rise to such liability, but this is because a conspiracy to injure is now recognised as a tort in its own right. It is also suggested by Morris L.J. that if the expulsion was made maliciously, liability might result in tort. This would certainly be a useful advance in the legal protection of

[6] The difficulty here seems to be that the cases relied upon by Denning L.J. do not appear to treat the actual excess of jurisdiction as *in itself* a substantive wrong, but merely decide that if the tribunal orders something to be done which would be a tort unless executed in pursuance of an order of the tribunal, the tribunal may be liable in damages *for that tort*, if its jurisdiction is exceeded in circumstances where the excess of jurisdiction ought to have been apparent.

[7] But as against this, it might be urged that the contract and/or its precise terms are themselves *facts* which ought to be pleaded.

[8] Although no explanation is given by the court, it is submitted that the reason lies in the lack of any duty (apart from a contractual duty) owed to the plaintiff. Nor is this one of those exceptional cases where the court will treat a breach of contract as giving rise to a concurrent liability in tort. (*Cf.* (1950) 13 M.L.R., pp. 294–301.)

an expelled member, but it must be observed that to allow such a cause of action would be contrary to the normal principle in tort that an act which is not in itself unlawful is not rendered unlawful by a malicious or improper motive (*e.g.*, *Allen* v. *Flood* [1898] A.C. 1; *Mayor of Bradford* v. *Pickles* [1895] A.C. 597). There are, of course, exceptions to this principle, of which the law of conspiracy is itself one of the most conspicuous, and some support for the view of Morris L.J. may also be found in the proposition of Bowen L.J. in the *Mogul S.S. Case* referred to above. On the other hand, it may be said that the act of removal of the member can only be wrongful as a breach of contract, and that a mere breach of contract, however malicious, is not in itself a tort.

As regards liability in *contract*, despite differences as to whether the contract or its terms were adequately pleaded, and as to whether the facts in this particular case warranted the inference of an implied term, all three members of the court were apparently unanimous that breach of contract did afford a legal basis upon which a claim for damages could be formulated in a case of wrongful expulsion, and it may be suggested that where removal from a register clearly involves exclusion from the pursuit of a remunerative occupation there seems no reason why those damages should not be substantial. The case does, however, abundantly illustrate the extreme difficulty in such cases of formulating the claim in a manner that will stand up to legal scrutiny, since not only does a precise agreement between identifiable persons have to be set forth supported by a specific valuable consideration, but also the exact terms of the agreement, and, in particular, the implied term or terms in breach of which the expulsion is alleged to have taken place, have to be pleaded. And the more skilfully such terms are drafted for presentation to the court the more apt the court is to say that, however appropriate or desirable they may be, it is quite unable to accept them as *necessary* terms on the basis of which the parties must be held to have contracted.

There remain one or two further matters raised in the above case which are deserving of brief comment. The basis of the court's jurisdiction to intervene does not seem to have been much discussed in the case itself. As has been already pointed out, the earlier doctrine that the court would only assume jurisdiction where there was a wrongful interference with a right of property, has tended to give way in favour of treating breach of contract as the true basis of judicial review. Thus it has long been recognised that where the members pay a subscription then, even though they retain no beneficial interest in the funds of the association, the court would be ready to intervene to restrain a wrongful expulsion (see *per* Fletcher Moulton L.J. in *Osborne* v. *A.S.R.S.* [1911] 1 Ch. at p. 562). In the present case it would appear from the observations of Morris, L.J., who alone referred to this issue, that jurisdiction could be based on this principle enunciated by Fletcher

Moulton L.J. Unfortunately, however, no facts are given in the present report to indicate what, if any, subscriptions were payable, though Denning L.J. does point out that the corn porters' committee had no property (at p. 236).

It is also worthy of note that all three Lords Justices apparently agreed that the trial judge was justified in declaring the resolution of the committee invalid. Although the language of *ultra vires* is used, this appears to mean no more than that the resolution was not warranted by and therefore contrary to the contractual relationship of the parties. And while the payment of a subscription might suffice to give the court jurisdiction to make a declaration such as was made here [9] the court could hardly declare an act to have been invalid (apart from tort or illegality) save on the basis that it conflicted with some contractual rule or undertaking. It would therefore seem that when the learned Master of the Rolls states (at p. 229) that the onus was on the committee to show some contractual foundation for their alleged jurisdiction to pass the resolution, and this they had failed to establish, the power of the court to make the necessary declaration proceeds on the basis that there was *a contract* between the defendant committee members and the plaintiff, and that the resolution complained of constituted a breach of that contract. As to the jurisdiction to grant an injunction, this point had become academic since the plaintiff had in fact been restored to the register, though Denning L.J. did point out that though such a remedy was not usually available to enforce personal relations,[10] save where a right of property was involved, an injunction might have gone if the defendants had insisted in not restoring the plaintiff's name to the register.

The trial judge also held that there had been a failure of natural justice, in that when the plaintiff was summoned to the second meeting of the committee he was not told that any charge was being made against him. Sir Raymond Evershed M.R. (who alone referred to this point), while declining to express a concluded view, did not dissent from this finding, though he went on to emphasise that the plaintiff was in fact well aware of the nature of the charge and the purpose for which the meeting was summoned. On this it may perhaps be said that while the cases have never insisted on any particular form of notification, it seems hardly adequate that the accused member should be left to guess what is to be alleged against him even though his guess may well turn out to be correct.

The allegation against Platt for wrongfully procuring a breach of contract obviously fell to the ground in the absence of proof of an appropriate contract, but in any event the majority of the

[9] See, *e.g.*, *Donaldson* v. *Institute of Botano-Therapy* (1937) 184 L.T.J. 384.

[10] *Quaere*, whether the right of a corn porter to remain on a register, removal from which will debar him from employment, can properly be described as a personal relationship?

court were clearly of opinion that there was no evidence of "procuring." Denning L.J., on the other hand, thought that Platt had induced the breach of contract by advising the committee to proceed. The line between advice and inducement is necessarily a very shadowy one, and the conflict of opinion here was not as to the governing principle but as to the correct inference to be drawn from the facts.

If the case of *Abbott* v. *Sullivan* serves mainly to emphasise the obstacles which face the expelled member in seeking relief from the ordinary courts, the subsequent decision in *Lee* v. *Showmen's Guild of Great Britain* ([1952] 1 All E.R. 1175) might seem at first sight at any rate to strike new ground in enlarging what was hitherto regarded as the ambit of the court's jurisdiction to intervene in an expulsion case. It is therefore necessary to examine the reasoning of the Lords Justices who decided that case with some care.

The facts of the case were comparatively simple. Both the plaintiff and one Shaw were members of the defendant guild (which was a registered trade union). By a previous ruling of the guild Shaw had been allotted a particular position on a certain fair ground. Later both Shaw and the plaintiff applied to the local authority for a site on the ground, and the local authority allotted the position claimed by Shaw under the guild's previous ruling, to the plaintiff. The plaintiff thereupon insisted upon occupying this site. Shaw complained to the committee of the guild. Under the rules of the guild no member was to indulge in "unfair competition," and there was also power under the rules to fine a member for a breach, and on non-payment of the fine to expel him from the guild. The committee having heard the complaint found the plaintiff guilty of "unfair competition" and fined him. The plaintiff refused to pay the fine, whereupon he was expelled. There was no allegation on the usual lines of any failure to observe the rules of natural justice, the main point being whether the plaintiff had been guilty of "unfair competition" within the meaning of the rules. For the guild it was argued that, provided the committee had acted in good faith, it was not open to the court to investigate the rightness of this decision. Both Ormerod J. and the Court of Appeal rejected this contention and held that the plaintiff's conduct could not amount to "unfair competition" within the meaning of the rule, and that the decision of the committee was *ultra vires* and void.

Somervell L.J., in his judgment, examined various conflicting dicta in some of the earlier cases,[11] and expressed a preference for the view that the court would interfere, not only on being satisfied that the committee had not acted honestly, but also, if there was

[11] *Leeson* v. *G.C.M.E.* (1889) 43 Ch.D. 366; *Allinson* v. *G.C.M.E.* [1894] 1 Q.B. 750; *Maclean* v. *Workers' Union* [1929] 1 Ch. 602. (*Cf.* (1950) 13 M.L.R., at p. 284).

no evidence on which they could have reasonably reached their finding. Further, the learned Lord Justice was of opinion that if the committee have reached a finding without any evidence upon which they could so find, the court is not precluded from interfering, although the committee may have honestly misconstrued the rules under which they were purporting to act. Somervell L.J., having reached the conclusion that there was no evidence in this case to support the committee's finding, held that this was sufficient to entitle the plaintiffs to the relief claimed, but concluded his judgment with the following words:—

> "This is a difficult and important branch of the law. I am alive, I hope, to the important and necessary work done by domestic tribunals normally with care, skill and fairness. I am also alive to the principle reiterated more than once that this court cannot be made a court of appeal from decisions of such tribunals. On the other hand, a power of expelling a member is a drastic power which in many cases, as here, may affect the plaintiff's livelihood, or reputation. There is, in my opinion, a distinction between cases where the decision challenged is under the rules based on the opinion of a committee on a matter which is primarily one of opinion, and those cases, such as the present, where the decision is, or should be, based primarily on the legal construction of words in a rule. The principles laid down in the former class of case are sufficient for the plaintiff here. I wish, however, to make it clear that, in my opinion, the principles laid down in those cases are not necessarily to be regarded as setting the limit to the jurisdiction of this court where the issue is one primarily of construction."

Denning L.J. began his judgment by affirming that the jurisdiction of a domestic (non-statutory [12]) tribunal is founded on contract, express or implied. The rules of the association contain the contract between the members, and are as much subject to the jurisdiction of the courts as any other contract. Denning L.J. rejected the test referred to in some of the older cases [13] which bases the jurisdiction on a right of property, and thought that proprietary rights were only relevant in cases where the right of the member would otherwise be too personal (*e.g.*, in the case of a member's right to enter a social club) to be specifically enforced. The relevance of rights of property thus went to the form of the remedy, not to the right itself.

The jurisdiction of a domestic tribunal, however, is subject to limitations imposed by public policy. Thus, natural justice must

[12] The main difference in the case of a statutory tribunal is the existence of the remedy of certiorari. That remedy is available in the case of an error of law, but only where it appears on the face of the record (see *R.* v. *Northumberland Compensation Tribunal* [1952] 1 All E.R. 122). Denning L.J. suggests that this limitation would not apply where the remedy sought was an injunction and declaration even in the case of a statutory tribunal (see [1952] 1 All E.R., at p. 1183).

[13] *e.g.*, *per* Jessel, M.R., in *Rigby* v. *Connol* (1880) 14 Ch.D., at p. 487.

be observed and cannot be excluded by agreement.[14] Moreover, the jurisdiction of the courts cannot be ousted, so that, though the tribunal can by agreement be made the final arbiter on questions of fact, its decisions on points of law cannot be excluded from review by the courts.

Resort may therefore always be had to the ordinary courts when the decision of the domestic tribunal turns on a point of law. The so-called "club-cases" are here of little assistance, as the only issue for determination in such cases has been whether the member has been guilty of conduct detrimental to the club, and this is a matter of opinion and nothing else. "It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great, if not greater, than any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers, but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say: 'No.' A man's right to work is just as important, if not more important, to him than his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work."

The true construction of the rules then is a matter of law, and this is to be decided in the last resort by the courts, whose jurisdiction cannot be excluded. It is not enough for the committee to act honestly if they have acted on a misconstruction of the rules. The rules are the contract between the members and the committee cannot extend their jurisdiction by giving a wrong interpretation to the contract, however honest they may be. In some cases it will be possible to distinguish clearly between the construction of the rules and their application, only the former being a question of law. Where, however, as must often happen, these two matters are inextricably mixed together, the question for consideration will be whether the facts as adduced before the tribunal were reasonably capable of being held to be a breach of the rules. The proposition that the court can interfere if there was no evidence to support the finding only means that the facts were not reasonably capable of supporting the finding.

[14] *Cf.* the similar view expressed by Denning L.J. in *Russell* v. *Duke of Norfolk* [1949] 1 All E.R., at p. 119 (some conflicting dicta on this point are collected in (1950) 13 M.L.R., at pp. 302–3).

Romer L.J. also emphasised the contractual nature of the member's right to remain a member unless and until he forfeited that right by conduct which, under the rules, would justify his expulsion. "In general, this right to continued membership of a trade union is of vital importance to men who join it, and expulsion from the union may well result in the loss to a man of his only known means of livelihood. It is a right which the courts recognise and will not hesitate, in proper circumstances, to protect."

In the view of the learned Lord Justice, the facts before the committee in the present dispute being virtually uncontested, the inquiry involved was wholly a question of law, *viz.*, whether these facts amounted to "unfair competition" within the meaning of the rule. Further, although the rules required the member to accept as binding the decisions of the tribunal, this must not be taken to extend to decisions on matters of law, including the construction of the rules themselves. The club-cases were distinguishable on the ground that the test of expulsion in such cases was merely a matter of opinion, and that the courts would not intervene to investigate questions which were matters of ethics rather than of law.

Finally, Romer L.J. turned to consider whether, had there been vested in the committee a final and exclusive power of interpreting the rules, a member would be debarred from resorting to the courts if the committee adopted a palpably erroneous construction. Without expressing a concluded view, Romer L.J. was of opinion that the same considerations of public policy would apply here as in other attempts to oust the jurisdiction of the courts. "The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task. The courts jealously uphold and safeguard the prima facie privilege of every man to resort to them for the determination and enforcement of his legal rights."

All the Lords Justices being of opinion that the facts adduced could not amount to "unfair competition" within the meaning of the rules, the decision of Ormerod J., that the committee had acted *ultra vires*, and that the expulsion of the plaintiff was void, was unanimously upheld.

It is submitted that this important decision, although it undoubtedly strikes new ground, in no way involves a reversal of the previous trend of decisions and, indeed, is fully in line with the more recent developments in this branch of law. As previously pointed out, the current trend has been to move away from the older view that jurisdiction in these matters is to be based on the right of property, and to found the jurisdiction squarely on the breach of a contractual duty owed to the member. Since the contract of the member with his fellow members or with

the association itself [15] is normally embodied in the rules of the association there seems no reason in principle why these rules should not be the subject of scrutiny by the ordinary courts just as in the case of any other contract. Moreover, the court has always insisted that in considering whether a member has been lawfully expelled it is necessary that there should have been strict compliance with the rules,[16] and it is difficult to see why any distinction should be drawn here between rules which are merely procedural and those which are of a substantive character.

In the club-cases, as in the case of statutory tribunals, the courts have insisted on the application of the rules of natural justice in a case of expulsion as an overriding principle, and it therefore seems to follow logically that the parties should not be allowed to contract out of these rules which the courts regard as fundamental. The error has been to assume that, because the court has hitherto intervened on this basis, and at the same time emphasised that it will not sit as a court of appeal from a domestic tribunal, it will never intervene on any other ground. It has several times been asserted in earlier cases that the court will not reverse the tribunal's decision on a finding of misconduct simply because it disagrees with it, but that it will set it aside if there is no evidence by which it can be supported.[17] And now that the contractual basis of the jurisdiction is at last fully acknowledged it seems equally to follow that the construction of the contract must be a matter of law which cannot, in the absence at any rate of clear words to the contrary, be within the exclusive discretion of one party to the contract.

As to the effect of an express clause excluding the jurisdiction of the courts on matters of law or construction, the general attitude of the courts seems to be hostile towards the exclusion of their jurisdiction, save where a statute so provides in plain terms. This attitude is sufficiently illustrated by the refusal of the courts to allow an arbitrator to have the last word on matters of law, even with the express consent of the parties.[18] No doubt there is much to be said for this view in the case of a notional contract, such as that derived from the rules governing a member's relations with his trade union or professional organisation, since there is really little or no genuine consensus on the part of the member in such a case. There is, perhaps, more to be said for the parties being able to make their own contract, including the mode in which it is to be construed, when they are contracting on a basis of genuine equality.

[15] *i.e.*, if the association is a corporation, or is of a quasi corporate character, as in the case of a registered trade union.

[16] *Cf. per* Lord Denman in *Innes* v. *Wylie*, 1 C. & K., at p. 264.

[17] See *Osgood* v. *Nelson* (1872) L.R. 5 H.L., at pp. 650, 654; *Allinson* v. *G.C.M.E.* [1894] 1 Q.B., at pp. 761, 763; *Thompson* v. *B.M.A.* [1924] A.C., at p. 778.

[18] *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478. See also *Re Wynn* [1952] 1 All E.R. 341, for a more generalised application of this doctrine, criticised in (1952) 68 L.Q.R., at p. 157. See also p. 427, *post*.

The decision in *Lee* v. *Showmen's Guild* thus affords, it is respectfully suggested, a welcome recognition of the contractual basis of the court's jurisdiction to review the finding of a domestic tribunal, and the implication therefrom that the contract is a matter for construction by the court in the same manner as any other contract. The fact, however, that this appears to be the first reported decision where the validity of an expulsion could be said to turn directly on the construction of the rules should serve to emphasise that it is only in the exceptional instance that the basis of this decision will afford a remedy. In the normal case the finding of a tribunal on an issue of misconduct will remain essentially one of fact and opinion, matters which *Lee's Case* does nothing to suggest the court will not still regard as primarily subjective and within the exclusive province of the tribunal. Further, *Abbott* v. *Sullivan* sufficiently exposes the difficulty of seeking to rely upon any implied term laying down the conditions upon which the tribunal is to exercise its jurisdiction. At the same time the power of the court to say there was no evidence upon which the finding could have been reached, does afford a useful reserve principle which has often been invoked in other spheres with salutary results.[19]

If a final word by way of conclusion may be permitted, *Lee's Case* emphasises the advantages inherent in the recognition of contract rather than property as the basis of the jurisdiction, while on the other hand *Abbott* v. *Sullivan* indicates that the category of contract is itself an inadequate instrument for the solution of many of the problems in this increasingly important legal territory. Of the acknowledged legal categories it would seem that only the law of tort could furnish the necessary machinery to make the supervision of the courts fully effective,[20] but that branch of law, despite the views of those who contend that it enshrines a general principle of liability for unjustifiable harm, has in this respect proved an insufficiently flexible instrument to meet the new social and economic conditions of our time.

Dennis Lloyd.[21]

[*Inasmuch as the validity of the High Court of Parliament Act is still to be determined by the Appellate Division of the Supreme Court of South Africa, publication of the second part of Professor D. V. Cowen's article, "Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa," will be deferred so that consideration may be given to the judgment of the court.*]

[19] *e.g.*, in appeals from the county courts, as to which see *Cumming* v. *Danson* [1942] 2 All E.R. 653; *Selwyn* v. *Hamill* [1948] 1 All E.R. 70.

[20] For American developments in this direction, see Prof. Z. Chafee in (1930) 43 Harv.L.R. 993. and Prof. Clyde Summers in (1951) 64 Harv.L.R. 1049.

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CONDITIONS, WARRANTIES AND DESCRIPTIONS OF QUALITY IN SALE OF GOODS—I

1. Introductory. Where a seller delivers defective goods, two questions immediately arise: what is the precise legal basis of his liability, and what rights has the buyer against him. Although these questions appear quite simple, the answers to them are difficult enough. Taking a broad preliminary view, the existing law may, somewhat paradoxically, be criticised as follows: (1) it has too much theory, (2) it has not enough theory, and (3) it has no theory whatever. There is too much theory because of the over-elaborate legal symbolism of "conditions," "warranties," "sale by description," "sale of specific goods" and so on. There is, on the other hand, too little theory because certain concepts, not being properly defined, have been allowed to fluctuate. There is, finally, no theory at all, because had there been a general or basic theory the existing complications and contradictions could never have arisen. In this paper I shall attempt to clarify the law. For this purpose I shall analyse the main legal principles and concepts and (where necessary) retrace their historical career.

2. The Warranty. It is with the warranty that we must begin.[1] For the warranty, properly understood, explains almost the whole range and scope of the seller's duties with regard to the quality of the goods. And it is only through an analysis of the warranty that we can best understand the confusing (because interfering) development of certain other important concepts such as "*caveat emptor*" (including its exceptions), the "condition," and "sale by description." Indeed, it can be truly said that without a grasp of the law of warranty, the central aspects of the law of sale of goods cannot really be mastered.[2]

[1] The best expositions of the law of warranty are those by Professor Williston, and I have learned most from him; see especially, 1 *Williston on Sales* (2nd ed., 1948), hereafter referred to as Williston, *Sales*, §§ 178–226; 4 *Williston and Thompson on Contracts* (2nd ed., 1936), hereafter Williston, *Contracts*, §§ 968–973, and 5 Williston, *Contracts*, §§ 1461–1462. For references to Professor Williston's several important articles, see notes, *infra*. See also, Burdick, "Conditions and Warranties" (1900) 1 Columbia L.R. 71; Prosser, "The Implied Warranty of Merchantable Quality" (1943) 21 Can.B.R. 446 *et seq.* (reprinted from (1943) 27 Minnesota L.R. 117 *et seq.*). For a broader view of the subject: K. N. Llewellyn, "On Warranty of Quality, and Society" (1936) 36 Col.L.R. 699; (1937) 37 Col.L.R. 341; Bogert and Fink, "Business Practice Regarding Warranties in Sale of Goods" (1930) 25 Illinois L.R. 400; Morrow, "Warranty of Quality: A Comparative Study" (1940) 14 Tulane L.R. 327, 527; Rabel, "The Nature of Warranty of Quality" (1950) 24 Tulane L.R. 273.

[2] As Professor Llewellyn has said, "[the warranty of quality] presents the sweep of sales law in perhaps its most dramatic form." *Cases and Materials on the Law of Sales* (1930) 204.

How then, to begin with, is the warranty to be defined?[3] According to section 62 (1) of the Sale of Goods Act, 1893, it is "an *agreement* with reference to the goods which are the subject of a contract of sale but *collateral* to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated."[4]

This definition, we are told,[5] was adopted by the draftsman "after much consideration," and, moreover, its main purpose was to bring out "the distinction between a condition precedent and a collateral undertaking or promise." Something will later[6] be said about this alleged distinction; for the present we are mainly concerned with the extremely misleading terms "agreement" and "collateral."[7]

Let us begin with the vital word "agreement." At first sight it would seem that, according to the statutory definition, a warranty is some sort of special, separate contract referring to the quality of the goods and ancillary to the "main purpose" of the contract of sale, which purpose is simply the transfer of title.[8] But it is also clear that it cannot be a special or separate contract in a strict sense of those words, because of the rule of law that no fresh consideration is required for such a contract,[9] provided the warranty is not made *after* the contract of sale.[10] It follows that the warranty is just one undertaking or promise in the bundle of promises which a seller must perform in consideration of the buyer's promise to pay the price.[11]

This, however, is not all. For the draftsman also tells us[12] that "a representation may amount to a warranty." But what exactly did the draftsman mean? If a warranty is defined as an "agreement" (and, indeed, as some special or "collateral" agreement),

[3] "There is no more troublesome word in the law than the word 'warranty'," 1 Williston, *Sales*, § 181.

[4] The italics are mine. It will be noticed that the latter part of the statutory definition states only the *effect* of breach of warranty and does not elucidate the first part of the definition. For the American definition of warranty, see § 10, *infra*.

[5] Chalmers, *Sale of Goods* (12th ed., 1945), 224.

[6] See *infra*, § 10. See also §§ 3, 4, *infra*.

[7] In connection with all this, Professor Williston has said: "This is something which the English law and the English lawyer has never been willing or able to define entirely," 1 Williston, *Sales*, § 182.

[8] In s. 1 of the Act the contract of sale is defined as the transfer of the property for the price. But if the transfer of property is, *by definition*, the main purpose of a contract of sale, do not the implied undertakings as to title in s. 12 become redundant?

[9] Chalmers, *op. cit.*, 46.

[10] In such a case the warranty is a "supplemental" contract, Chalmers, *op. cit.*, 46.

[11] The bundle of promises may, rather scholastically, be enumerated as follows: (1) promise to *deliver* the goods; (2) promise to give *title* to the goods; (3) promise to deliver the right *quality* of the goods; (4) promise to deliver the right *quantity* of the goods; and (5) promise to deliver the goods at the right *time*.

[12] Chalmers, *op. cit.*, 46–47.

how can a *representation* amount to a warranty as well? For needless to say, " representation " and " agreement " are different legal concepts, the former giving rise, if at all, to a tortious and the latter to a contractual liability.

The simple truth of the matter is that a warranty may be both a promise and a representation.[13] Its dual nature, however, became obscured by a rather complicated historical development. Although the warranty started out as an agreement strictly so called,[14] requiring special words for its creation,[15] an entirely new chapter began in the eighteenth century. It was then first established by Holt C.J.,[16] that a vendor's statement as to title would be an actionable warranty even though it was not made in special words or was made without knowledge that it was actually false.[17] Thus arose a novel type of warranty, *i.e.*, the warranty implied in fact, and its practical importance lay in this: (1) it extended the contractual liability of the express warranty by making unnecessary special words of undertaking and (2) it also created (what we now would regard as) a purely tortious liability where the seller had made affirmations or representations as to title which induced the buyer to buy. This development proceeded the more easily since the appropriate form of action for breach of warranty was the action of deceit. But in the latter part of the eighteenth century, breach of warranty began to be declared in assumpsit [18] until, eventually, the warranty was " transferred almost bodily into the domain of contract." [19] Whilst, as a result of this procedural development, the strictly contractual aspect of the warranty was very properly brought into relief, its delictual nature became very blurred.[20]

[13] *Cf.* Williston, " Representations and Warranties " (1913) 27 Harvard L.R. 1; " Liability for Honest Misrepresentation " (1911) 24 Harvard L.R. 415.

[14] It began as a covenant real in the early land law: see S. J. Bailey, " Warranties of Land in the Thirteenth Century " (1944) 8 Cambridge L.J. 274; (1945) 9 Cambridge L.J. 82, 192.

[15] *Chandelor* v. *Lopus* (1603) Cro.Jac. 4. This case makes it quite clear that such words as " *warrantizando vendidit*," etc., were then always necessary to create an express warranty. The case is fully discussed (and defended) from the point of view of the law of pleading in (1887) 1 Harvard L.R. 191; see also Hamilton, " The Ancient Maxim of Caveat Emptor " (1931) 40 Yale L.J. 1133, at 1166–9; but see 1 Williston, *Sales*, § 195, n. 6.

[16] Lord Holt's decisions were: *Cross* v. *Gardner* (1689) 1 Show. 68; *ibid.*, Carthew 90; 3 Mod. 261; *Medina* v. *Stoughton* (1700) 1 Ld.Raym. 593; 1 Salk. 210. " How far these decisions advanced beyond the earlier law is not perfectly clear . . . but Lord Holt at least made clear what was doubtful before," 1 Williston, *Sales*, § 196, n. 7; see also Williston, " What Constitutes an Express Warranty " (1908) 21 Harvard L.R. 555, at 556.

[17] If the seller knowingly made a misstatement, deceit would of course, lie. See Selwyn, *Nisi Prius* (1820) vol. 1, 640 *et seq.*

[18] *Stuart* v. *Wilkins* (1778) 1 Doug. 18 is the first reported case. But the practice of declaring in assumpsit seems somewhat older; see *ibid.*, Buller J. at 21. See also *Jones* v. *Bright* (1829) 5 Bing. 533; 8 Holdsworth, *History of English Law*, 67–70. The warranty preceded assumpsit by almost a century, see Ames, " History of Assumpsit " (1888) 2 Harvard L.R. 1.

[19] Street, *Foundations of Legal Liability*, vol. 1, 390.

[20] It must be noticed that the implied-by-law warranty of title was not established until the middle of the nineteenth century (*cf. Morley* v. *Attenborough* (1849) 3 Exch. 500), after the law had already evolved the implied-by-law

There is another point. Chalmers also noted that an affirmation or representation may amount to a warranty provided that "it is intended as such—that is to say, if it is intended to form part of the contract." [21] These words are particularly perplexing. For a representation intended to form part of the contract is, in effect, a contractual term; as a contractual term it is a part of the seller's promise. In short, the annotation is tautologous, for all it means is simply that a promise may amount to a warranty. But the whole point about the representation is that it induces the agreement, *i.e.*, induces the buyer to buy.[22] It follows that a representation "forming part of the agreement" fulfils no separate function. Unfortunately, not only have the books dutifully adopted the Chalmers view,[23] but the House of Lords has also given it judicial recognition. Thus in *Heilbut Symons & Co.* v. *Buckleton* (1913) [24] an important affirmation was held not to amount to a warranty because it did not "appear on evidence to be so intended," [25] and Lord Moulton purported to re-enunciate "the true principle of law which was laid down in early days by Holt C.J." [26] In point of fact, Holt had never said anything about "intention," and the requirement of "intent" was first mentioned by Buller J., in *Pasley* v. *Freeman* (1789) [27] and attributed by him to Holt. And all that Bullen probably meant was not an intention to contract, but an intention to *induce* the other party. The true meaning of "intent" was well stated by Benjamin as follows: [28]

> "In determining whether warranty was intended, a decisive test [29] is whether the seller assumes to assert a *fact* of which the buyer is ignorant or merely states an opinion or judgment upon a matter about which the seller has no special knowledge, and on which the buyer may be expected also to have an opinion

warranty of quality. For the latter development, see § 4, *infra*. It should, perhaps, also be noticed that not until the Common Law Procedure Act, 1852, was a sharp distinction made between tort and contract; *cf.* Bullen and Leake, *Pleading* (1860) v, vi.

21 Chalmers, *op. cit.*, 46–7.

22 *Cf.* 4 Williston, *Contracts*, § 971.

23 *e.g.*, Salmond and Williams, *The Law of Contracts* (1945) 236–7; Cheshire and Fifoot, *Law of Contracts* (2nd ed.) 88–90.

24 (1913) A.C. 30.

25 *Per* Lord Moulton, *ibid.*, at 49. But compare this with Lord Moulton's remarks in *Schawel* v. *Reade* (1913) 2 Ir.R. 81 at 85, 86.

26 *Ibid.*

27 3 T.R. 51, 57. *Cf.* Williston, *op. cit.* (1908) 21 Harvard L.R. 555, 560–1.

28 *Benjamin on Sale* (7th ed., 1931) 691. This passage appears in all editions with the two alterations mentioned in notes (29) and (30), *infra*. Indeed, the passage was adopted by the Court of Appeal in *De Lassalle* v. *Guildford* [1901] 2 K.B. 215, 221, but the reporter failed to indicate where this quotation came from. Because of this typographical omission, Lord Moulton selected it for criticism as a "serious deviation from correct principle." See on all this, 1 Williston, *Sales*, § 198, and also by the same author (1913) 27 Harvard L.R. 1.

29 In the last edition, the words "decisive test" are replaced by "valuable, though not decisive test."

and to exercise his judgment. In the former case it is a warranty, in the latter not." [30]

There is another aspect of all this. The alleged distinction between affirmations intended to form part of the contract and affirmations not so intended has sometimes been taken to mean that there is a vital difference between conditions and warranties on the one hand and representations on the other, the reason being that whilst the former are " integral " or " substantive " parts of the contract, the latter are not.[31] But this meaning of " intention " seems as mistaken as the one we have previously considered. And it is respectfully submitted that, what is actually implied in this distinction is not the difference between " substantive " and " non-substantive " parts of a contract, but the distinction between *material* and *immaterial* misrepresentations. That this has not been seen is probably simply due to the fact that a seller's representations are usually material inasmuch as they affect the merchantable quality of the goods. Yet there may be immaterial representations also. Suppose a vendor represent his bicycle as " practically new " and also affirms that he bought it only a fortnight earlier; the latter statement, if false, may nevertheless be regarded as immaterial, provided the bicycle is practically new. The short point is that only material representations amount to warranties, and in the following discussion we shall assume that the representations are material.

To summarise. The misfortune is that the draftsman did not perceive the *dual* nature of the warranty more clearly. For not only was it clearly recognised in many nineteenth century decisions that a warranty could be both a promise and a representation,[32] but it is precisely this duality which makes the warranty that extremely useful as well as indispensable concept in the sale of goods. Consider, for example, the usual case where A buys goods from B, B stating that the goods are sound (*e.g.*, " I can also say that the goods are in perfect condition "). In a sense, this statement may be regarded as part of B's offer (or promise) to sell or deliver " perfect " goods. But in another sense,

[30] The last sentence is left out in the last edition.

[31] This distinction derives from Williams J.'s statement of the law in *Behn* v. *Burness* (1863) 1 B. & S. 877; 3 B. & S. 751, at 753–5. Representations which were not " substantive " parts of the contract, the learned judge called " mere " representations.

[32] See especially the following cases: *Salmond* v. *Ward* (1825) C. & P. 211; *Cave* v. *Colman* (1828) 3 M. & R. 2; *Wood* v. *Smith* (1829) 4 C. & P. 45; *Allan* v. *Lake* (1852) 18 Q.B. 560; *Stucley* v. *Bailey* (1862) 1 H. & C. 405; *Cowdy* v. *Thomas* (1877) 36 L.T.(N.S.) 22. The decision in *Hopkins* v. *Tanqueray* (1854) 15 C.B. 130; 23 L.J.C.P. 163, seems to contradict all this, but it is submitted that the better explanation of that case lies in a remark by Maule J., 15 C.B., at 140, to the effect that the seller's assurance was so antecedent to the actual sale that it could only be regarded as an expression of opinion and not as a misrepresentation of fact inducing the buyer to buy the horse.

B only represents the goods as sound, which representation constitutes an inducement. Yet to try to classify B's statement as either promise or representation would be a rather sterile and unnecessary undertaking. All that we need usefully say is that we have here a dual liability, so that B's statement must constitute a warranty, whether it amounts to a promise or to a representation.[33]

3. The "Collateral" Aspect of the Warranty. The other misleading word in the statutory definition is "collateral." This term has, unfortunately, very many meanings which (if only for the sake of comprehensive discussion) may perhaps be fully listed.

(1) A warranty may be "collateral" for the purposes of the law of evidence, *i.e.*, it may operate as an exception to the parol evidence rule and may therefore be given in evidence although the agreement is reduced to writing.[34]

(2) A warranty may be "collateral" from the point of view of pleading, *i.e.*, a seller suing for the price of goods need not declare that he has performed all warranties; it is for the buyer to complain of their breach by way of defence or counter-claim. Thus, the meaning of collateral is simply that it shifts the burden of proof.[35]

(3) A warranty may be regarded as "collateral" in the sense in that it is auxiliary to the "main purpose" of the sale, which main purpose is the transfer of title.[36]

(4) A warranty may similarly be regarded as "collateral" in that it is a special agreement accompanying the sale of specific goods and not an integral part of the *description* of the goods.[37]

(5) A warranty may be called "collateral," again in the sense of a special, separate undertaking, the "sole effect" of which is "to vary or add to the terms of the principal contract."[38] Stated differently, the warranty is collateral in that it is a specially agreed exception to the general rule of *caveat emptor*.

(6) A warranty may be regarded as "collateral" where collateral means less important: a collateral warranty is a less important

[33] Yet the notion that the warranty is a "purely" contractual concept seems still to persist; see, for example, Rabel, "The Nature of the Warranty" (1950) 24 Tulane L.R. 273, at 279. It is submitted that this is only true in the sense that the warranty will, in the nature of the case, only arise in a contract situation; which does not mean, however, that the *basis* of liability for breach of warranty is also always contractual. See also Prosser, "The Implied Warranty of Merchantable Quality" (1943) 21 Can.B.R. 446, at 447–8.

[34] *De Lassalle* v. *Guildford* [1901] 2 K.B. 215. For a full discussion of this problem, see J. Williams, *The Statute of Frauds, s. 4* (1932) 188–193; Benjamin, *op. cit.*, 696–7.

[35] *Parker* v. *Palmer* (1821) 4 B. & Ad. 387, at 391. The decision was foreshadowed in *Clark* v. *Gray* (1805) 6 East 564. See, generally, 5 Williston, *Contracts*, § 1461.

[36] See the statutory definition, s. 62 (1), quoted § 2, *supra*.

[37] See Bullen and Leake, *op. cit.*, 267, note (*a*). "[For] a warranty of quality is not an essential element of a sale, it is a collateral engagement to be attached to or omitted from it at the pleasure of the parties," Williams, *Vendor and Purchaser* (4th ed., 1933), vol. ii, 758.

[38] *Per* Lord Moulton, *Heilbut* v. *Buckleton* [1913] A.C. 30, at 47–8.

obligation than the " condition "—the condition denoting the seller's basic duty to deliver such goods as answer the description.[39]

(7) A warranty may be called " collateral " from the point of view of legal effect, inasmuch as, according to the statutory definition, it gives rise to a right to damages, but not to a right to repudiate the goods.[40]

(8) A warranty may be " collateral " in that it is an " independent " and not a " dependent " promise.[41]

(9) A warranty may, finally, be " collateral " from the point of view of pure form or verbal sequence.

It may be pointed out that (1) *supra* may still be useful with regard to the admissibility of parol evidence; (2) *supra* has no longer any modern importance in sale of goods; and that (3) to (8) *supra* illustrate various aspects of the warranty which resulted from the distinction that was drawn between sale by description and sale of specific goods. This will become more explicit in the course of this discussion. On the face of it, the ninth and last meaning of " collateral " should also be the least important, but, unfortunately, this is not so.

Now what is meant by collateral in " form " or " verbal sequence "? A simple example will make this clear. Suppose A says to B: " I'll sell you my car," and B replies: " I'd take it, but is it all right? " And A replies: " I can guarantee that it is in excellent condition." Thus A " sells " the car, and subsequently, separately as it were, guarantees or warrants its excellent condition. The warranty is therefore collateral in form or verbal sequence, because it is separate from, or subsequent to, the seller's promise to sell the car.[42]

In the early law of sales, most warranties were collateral in form. The reason was that the typical situation of buying and selling was the horse-sale in the market-place combined with the stern rule of *caveat emptor*.[43] For, because of *caveat emptor*, the early buyer could only protect himself against the purchase of a latently defective horse by requiring a special warranty of quality which because of the accidents of the situation was therefore collateral in form.

This had, it is submitted, two far-reaching effects. In the first place it gave rise to the idea that a warranty was a special agreement quite distinct from the bargain and sale of the specific article: in other words, a bargain and sale *plus* an express warranty seemed to represent two contracts instead of one. Indeed, the more so,

[39] *Per* Fletcher-Moulton L.J. (as he then was) in *Wallis* v. *Pratt* [1910] 2 K.B. 1003, at 1014.

[40] This follows from the statutory definition and from Chalmers' distinction between conditions and warranties, see Chalmers, *op. cit.*, pp. 49, 152, 175 and 225.

[41] See § 10, *infra*.

[42] For a fuller discussion of this, see § 9, *infra*.

[43] The history of *caveat emptor* has been brilliantly dealt with by Professor Hamilton, " The Ancient Maxim of Caveat Emptor " (1931) 40 Yale L.J. 1133.

because the bargain and sale was executed on the spot (*e.g.*, the instantaneous delivery of the horse for the immediate payment of the price), so that the only contract that remained over was the "special contract of warranty." In the second place it also promoted the bifurcation of the law of sales into the sale of specific goods (with or without warranties) on the one hand and the sale by description on the other. This distinction, artificial and inefficient though it was, became the cornerstone upon which, in the nineteenth century, the whole conceptual frame-work of the law of sale of goods was built.

4. The Warranty and "Description." In the early nineteenth century the law of sale of goods underwent a profound transformation. The courts developed the theory that "sale by description" constituted some sort of special type of sale; and also substantially restricted the rule of *caveat emptor* by creating the warranty of quality implied-by-law. These developments took place concurrently and overlapped, and because of it created much confusion. To explain this we must consider two well-known, yet also very misleading, cases both decided by the Court of Exchequer in 1838. In *Barr* v. *Gibson* [44] A bought a ship from B which at the time of the sale was supposed to be at sea but which in fact had got ashore and become a near-wreck. Her value had dropped from £4,200 to £10, the jury having found that she was just a cheap bundle of timber. In the second case, *Chanter* v. *Hopkins*,[45] X ordered a "smoke-consuming furnace" from Y to be fitted in X's brewery. X had carefully indicated what he needed, but the furnace proved to be totally unsuitable.

In both these cases the essential question was whether a warranty of quality would be implied by law since the seller had neither promised nor affirmed merchantability (*i.e.*, the seaworthiness of the ship) or fitness (*i.e.*, fitting X's brewery). But it was held that no such implication could be made because the chattels were specific and ascertained. Thus Baron Parke said in *Barr* v. *Gibson* [46]:

> "In the bargain and sale of an existing chattel, by which property passes, the law does not, in the absence of fraud, imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale, therefore, of the ship does not imply any contract that it is then seaworthy, or in a serviceable condition; . . . But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description. . . ."

And in *Chanter* v. *Hopkins*, Lord Abinger delivered himself of the following famous passage [47]:

> "A good deal of confusion has arisen in many of the cases on this subject from the unfortunate use made of the word

[44] 3 M. & W. 390; 7 L.J.Ex. 124.
[45] 4 M. & W. 399; 8 L.J.Ex. 14.
[46] 3 M. & W. 390. at 399–400.
[47] 4 M. & W., at 404.

> 'warranty.' Two things have been confounded together. A warranty is an express or implied [48] statement of something which the party undertakes shall be part of a contract, and though part of the contract, yet collateral to the express object of it. But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract the breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty that he should sell him peas*, the *contract is to sell peas*, and if he sells him anything else in their stead, it is a non-performance of it." [49]

Several points arise from these judicial statements. In the first place, both Baron Parke and Lord Abinger unfortunately misconstrued the effect of several earlier decisions. For these had clearly established not only that a warranty of merchantable quality would be implied, especially in such situations where the buyer had had no opportunity to inspect the goods, but also that this implication did not depend upon the distinction between the sale of specific chattels on the one hand and the sale by description on the other. This is clearly brought out by the two earliest leading cases concerning the implied-by-law warranty of quality. In *Gardiner* v. *Gray* (1815) [50] the buyer bought 12 bags of "waste silk" which turned out to be unmerchantable. Lord Ellenborough said: "Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He [*i.e.*, the buyer] cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill." [51] Similarly, in *Jones* v. *Bright* (1829) [52] the buyer bought copper from a manufacturer for the particular purpose of sheathing a ship. But the copper proved defective in that it lasted only four months instead of the normal period of four years." "The law, then," said Best C.J.,[53] "resolves itself into this: that if a man sells generally, he undertakes that the article is fit for some purpose; if he sells for a particular purpose, he undertakes that it shall be fit for a particular purpose."

Clearly, the 12 bags of "waste silk" were as specified as the wrecked ship; and the copper for the ship was as identified as

[48] The word "implied" could obviously only mean "implied in fact."
[49] My italics.
[50] 4 Camp. 144. *Cf.* also *Laing* v. *Fidgeon* (1815) 4 Camp. 169; *Okell* v. *Smith* (1815) 1 Stark. 107; *Bridge* v. *Wain* (1816) 1 Stark. 504.
[51] *Ibid.*, at p. 145.
[52] 5 Bing. 533.
[53] *Ibid.*, at 546.

the "smoke-consuming furnace."[54] And whilst it is true that in making the implication of merchantable quality, both Lord Ellenborough and Best C.J., pretended that they were merely giving effect to the "contractual intention" of the parties, it is equally obvious that, whether or not such was the actual contractual intention, the warranty implied-by-law constituted a completely new obligation upon the seller, *i.e.*, an obligation to deliver an article that was merchantable or fitted the particular purpose indicated, irrespectively of whether the seller had actually either promised or affirmed that the article in question would be merchantable or fitting. Indeed, in *Shepherd* v. *Pybus* (1842)[55] this obligation was extended. In this case a warranty of quality was implied in a sale of an admittedly specific barge which the buyer had inspected and in which property had passed to him. In other words, a warranty was implied by law not because the buyer had not had an opportunity for inspection, but because the buyer had not been able to exercise a judgment of his own. "[And] this," as Mellor J. so rightly observed in *Jones* v. *Just* (1868),[56] "appears to us to be at the root of the doctrine of implied warranty, and that in this view it makes no difference, whether the sale is of goods specially appropriated to a particular contract, or to goods purchased as answering a particular description."[57]

The whole development just traced completely contradicts the rationale in *Barr* v. *Gibson* and *Chanter* v. *Hopkins*, and both these decisions plainly reveal themselves as inconsistent and incompatible with the essential pattern of the nineteenth-century law. It therefore follows that their authority stands almost fatally impaired, at

[54] This point was first made by Professor Prosser, "The Implied Warranty of Merchantable Quality" (1943) 21 Can.B.R. 444, at 470.

[55] 3 Man. & S. 868; 11 L.J.C.P. 101. *Barr* v. *Gibson* was not cited at all, but this does not affect the soundness of the decision; see especially the reasoning of Tindal C.J., 3 Man. & S., at 880–1. This decision, which must also be taken to overrule *Bluett* v. *Osborne* (1816) 1 Stark. 384, was foreshadowed by *Brown* v. *Edgington* (1841) 2 Man. & G. 279; 10 L.J.C.P. 66. In *Brown*, however, the seller was not a manufacturer, but a dealer, and it is therefore the first definite "dealer"-case. See also *La Neuville* v. *Nourse* (1813) 3 Camp. 351, and *Burnby* v. *Bollett* (1847) 16 M. & W. 644.

[56] (1868) L.R. 3 Q.B. 197, at 207.

[57] This, it is submitted, is the essential *ratio decidendi* in that case. Mellor J., however, at the beginning of his judgment also enunciated *obiter* five rules according to which the cases concerning *caveat emptor* should be classified (see (1868) L.R. 3 Q.B., at 201 *et seq.*). The trouble with these rules is twofold: (1) His first three rules make nonsense of his actual *ratio decidendi*, for they state and restate the principle that *caveat emptor* applies in full if the sale is for a specific chattel which *may* be inspected. This, however, was also the case in the facts before the learned judge. (2) The last two rules state the principle that where the seller contracts to *supply* goods, a warranty of quality will be implied if either the buyer has stated his particular purpose or there is no opportunity of inspecting the goods. But the seller may contract to *supply* chattels which *may* be inspected. What then, is the decisive test: the potential opportunity to inspect or the actual reliance by the buyer? Actually, Mellor J. attempted to reconcile too much. In formulating his rules he seems to have forgotten that he would have to make a choice between some contradictory decisions. One cannot build a principle as one cannot make an omelette without breaking (at least some) eggs.

any rate with regard to the general proposition that in the case of specific chattels no warranty of merchantable quality or fitness would be implied by law. But even wrong or obsolete decisions sometimes preserve a petrifying vitality all their own, especially if Baron Parke happened to be their champion. *Barr* v. *Gibson* was followed in a few later cases [58]; it was also given a new lease of life through its incorporation in Mellor J.'s rules concerning *caveat emptor*.[59] From there it passed into the Sale of Goods Act and Chalmers quotes Parke B., with apparent approbation.[60] The total confusion can best be seen in the peculiar drafting of section 14 of the Act, which will later be discussed in somewhat greater detail.[61] In short, *Barr* v. *Gibson* has been responsible for so much harm that one is chary of according it even decent burial.

In view of all this, Lord Abinger's statement of the law assumes renewed importance.[62] So full of assurance was his style, and so impressionably apt his peas-and-beans analogy, that it has hardly occurred to anyone that, in certain respects, he might have been mistaken.[63] For implicit in his statement is the distinction between (1) a buyer buying "peas" which are specially promised or represented as being "merchantable," and (2) a buyer buying "merchantable peas"; and, according to Lord Abinger, in (2) the word "merchantable" is not a warranty but part of the definition or description of the goods. But the distinction between the buyer buying "merchantable peas" and "peas warranted merchantable" is purely formal and accidental, so that this difference in verbal sequence can make no difference to what the seller promises to sell or the buyer is induced to buy. The short point is that "merchantable" amounts to a warranty, whether collateral in form or not, and the delivery of "unmerchantable peas" is as much a breach of warranty as the non-delivery of "peas warranted merchantable.[64] Furthermore, Lord Abinger also overgeneralised

[58] See, *e.g.*, *Emmerton* v. *Mathews* (1862) 7 H. & N. 586; 31 L.T.Ex. 139; *Smith* v. *Baker* (1878) 40 L.T. 261.

[59] See note 57, *supra*.

[60] Chalmers, *op. cit.*, 60.

[61] See § 10, *infra*.

[62] See p. 432, *supra*.

[63] It must be noticed that Lord Abinger was not "protesting" as Chalmers seems to have thought (*op. cit.*, 175), against the confusion between conditions and warranties, because he was simply not concerned with conditions in that case. Nor was he concerned with laying down a special rule relating to goods sold under a patent name. For this rule, now incorporated in the proviso to s. 14 (1), *Chanter* v. *Hopkins* is of course still the leading case though subsequent decisions have modified it greatly; see especially *Bristol Tramways Co.* v. *Fiat Motors, Ltd.* [1910] 2 K.B. 831; *Baldry* v. *Marshall* [1925] 1 K.B. 260. See Mechem, "Trade Names" (1927) 11 Minnesota L.R. 485.

[64] Professor Williston points out that at one time it was doubtful whether words of description were warranties or not. "The law is now, however, convincingly settled that descriptive statements do constitute a warranty," 1 Williston, *Sales*, § 205. See also *Parsons* v. *Sexton* (1847) 4 C.B. 899; 16 L.J.C.P. 181; *Allan* v. *Lake* (1852) 18 Q.B. 560.

the " peas-beans " analogy. Where the seller merely sells " peas " and delivers unmerchantable peas, the question is not whether the seller has performed his contract or whether " unmerchantable peas " answer the definition of " peas." For the seller only sells *peas*, he does not promise to deliver *merchantable peas*. The crucial question therefore is whether *caveat emptor* will apply, or whether, on the other hand, the law will impose an additional duty to supply *merchantable peas*, whether the sale is for specific goods or not.

5. The Doctrine in Street *v.* Blay. The law, however, had from early on also been troubled by another difficulty which for present purposes may be called the doctrine in *Street* v. *Blay* (1831).[65] In that case the court of King's Bench enunciated the broad doctrine that a buyer of a specific chattel, in which property passes to him immediately, may not reject the specific chattel for breach of warranty, on the ground that the buyer may not unilaterally revest the title in the seller.[66]

For this doctrine very little authority previously existed, and what there was was rather confused and inconclusive.[67] In fact, the better available authority was overwhelmingly against it.[68] Perhaps the then most recent authority against the doctrine was the decision in *Poulton* v. *Lattimore* (1829),[69] in which the buyer bought certain seeds which the vendor had warranted to be " good growing seed " but which later turned out to be completely worthless. Not only was it clearly assumed that the buyer could reject the goods in all cases where they did not correspond to warranty, but the strange question was raised whether a buyer could both escape liability for the price and not return the article at all.[70]

Unfortunately, the doctrine in *Street* v. *Blay* became an immediate success with Baron Parke, who even referred to it on some not

[65] 2 B. & Ad. 456.

[66] Lord Tenterden C.J. did not actually lay down a very definite doctrine. He, in fact, expressly denied such an intention (at p. 460), and he merely said (at p. 463) that in an executed sale, as distinct from an executory one, the vendee *may not* have a right to return the article. However this may be, this case has subsequently been treated as laying down a precise rule.

[67] *Cf. Weston* v. *Donnes* (1778) 1 Doug. 23; *Towers* v. *Barratt* (1786) 1 T.R. 133; *Payne* v. *Whale* (1806) 7 East 274; *Power* v. *Wells* (1778) 1 Doug., n. 24; *Dr. Compton's Case* (1786) 1 T.R. 133, at 136; 1 H.Bl. 20, n. (*b*).

[68] The right of rejection seems recognised in *Power* v. *Wells* (1778) 2 Cowp. 818; *Fielder* v. *Starkin* (1788) 1 H.Bl. 17. Stronger authorities are: *Buchanan* v. *Parnshaw* (1788) 2 T.R. 745, at 746, *per* Lord Kenyon; *Curtis* v. *Hannay* (1800) 3 Esp.C. 82; *Payne* v. *Whale* (1806) 7 East 274, at 278–9; *Caswell* v. *Loare* (1809) 1 Taunt. 566; *Okell* v. *Smith* (1815) 1 Stark. 107; *Yates* v. *Pim* (1816) 6 Taunt. 446; 2 Margh. 141; *Parker* v. *Palmer* (1821) 4 B. & Ald. 387, *per* Best C.J., at 395; *Germaine* v. *Burton* (1821) 3 Stark. 32; *Toulmin* v. *Hedley* (1845) 2 Car. & Kir. 157. For a full discussion see Williston, " Rescission for Breach of Warranty " (1903) 16 Harvard L.R. 465. Williston's views were strongly opposed by Professor Burdick in (1904) 4 Col. L.R. 1; *ibid.*, at 105 (Williston's reply) and Burdick's " Codification of the Doctrine of Rescission," *ibid.*, at 264.

[69] 9 B. & C. 257; 7 L.J.K.B.(o.s.) 225.

[70] See the argument by Sergeant Andrews, 9 B. & C. 257, at 260.

very relevant occasions.[71] However, the high-water mark of the new doctrine was reached in *Dawson* v. *Collis* in 1851.[72] The buyer bought goods by sample but the goods did not correspond to sample. He refused to accept the goods and the vendor then brought an action for the purchase-price. Apart from an interesting point of pleading,[73] the court applied the principle in *Street* v. *Blay* and disallowed the right of rejection. Although it is not quite certain whether they regarded a sale by sample as a sale of specific goods,[74] it is certain that the court wished to extend the doctrine in *Street* v. *Blay*,[75] even to executory contracts. Indeed, the court was trying (if one may rationalise its reasoning) to establish some kind of compromise: let *caveat emptor* continue to apply to the extent that the buyer's right of rejection would completely disappear; on the other hand, let the buyer have a right to damages in every case where the goods prove to be unmerchantable. Fortunately, such a rule did not become part of English law, even though it had the advantage of simplicity.

Only one exception the court would allow: where the goods were wholly worthless, the right of rejection should continue to exist. For this exception, the cases of *Poulton* v. *Lattimore*[76] and *Young* v. *Cole* (1837)[77] were cited. But the latter case was not really in point, for it dealt with a completely different situation. A stockbroker had sold, on behalf of the defendant, certain bonds which later turned out to have no value. The stockbroker reimbursed the defendant to whom he had previously handed over the purchase-price, but who now refused to return it. It was held, that the stockbroker was entitled to recover the money paid over as there had been a total failure of consideration. Yet Williams J., in *Dawson* v. *Collis*[78] interpreted *Young* v. *Cole* as establishing a distinction between condition and warranty, thus confusing the condition with total failure of consideration and the quasi-contractual action to which it gave rise. But once the fateful word "condition" was thus introduced, it was

[71] *Dixon* v. *Yates* (1833) 5 B. & Ad. 313; *Syers* v. *Jonas* (1848) 2 Ex. 111, at 117; *Murray* v. *Mann* (1848) 2 Ex. 538, at 538–9; see also *Allen* v. *Cameron* (1833) 1 Cr. & M. 832; *Pateshall* v. *Trouter* (1835) 3 Ad. & E. 103, at 104; *Gompertz* v. *Denton* (1832) 1 Cr. & M. 209.

[72] 10 C.B. 523; 20 L.J.C.P. 116. *Street* v. *Blay* had previously already been applied in *Parsons* v. *Sexton* (1847) 4 C.B. 899; 16 L.J.C.P. 181.

[73] The point was an exceptionally good example of an "argumentative traverse," the buyer pleading non-assumpsit in an action for the price for goods sold and delivered.

[74] Jervis C.J., 10 C.B., at 531, seems to have regarded it as a sale of specific chattel, whereas Creswell J. seems to have held differently, *ibid.*, at 533.

[75] "But it seems to me that the principle of *Street* v. *Blay* ought to be extended, and that the just and convenient thing is, that the vendee should have an action for breach of warranty . . . ," *per* Maule J., at 532.

[76] 9 B. & C. 257; 7 L.J.K.B.(o.s.) 225. This case is now the illustration for s. 53 (1) (*a*).

[77] (1837) 3 Bing.N.C. 724; 4 Scott 489.

[78] (1851) 10 C.B. 523, at 530.

but a very small step to the further generalisation that a breach of warranty would not entitle rejection " unless there be an express condition to that effect." [79] This new and mistaken distinction was later taken up by Lord Blackburn (as he became) in the very influential decision of *Kennedy* v. *Panama, etc.* (1867),[80] and thence passed into the Sale of Goods Act,[81] and indeed beyond.[82]

Before going further it is necessary to consider the doctrine in *Street* v. *Blay* as such, assuming that it is confined to specific chattels only. Two things may be briefly said about it. First, the doctrine is unjust for it unduly penalises the buyer. " He does not want, as Professor Williston has put it,[83] an unsound horse, worth half the money and the difference in damages." Secondly, it is entirely artificial to argue that the buyer must lose his right of rejection because he cannot unilaterally divest himself of " property " or " title." For the notion of " passing ownership " is really only useful where the question arises as to who, between buyer and seller, is to bear the risk of loss or where third parties become involved. Furthermore, the buyer is entitled to revest the property in the case of fraud; and the seller has even the two further rights of (i) retaining and (ii) reselling the goods, even though " title " may have left him.[84]

It follows that the doctrine in *Street* v. *Blay* creates legal complications which have no intrinsic merit.[85] Above all, it poses the unnecessary problem of what is a sale of a specific chattel as distinct from a sale of description. Actually, as we shall later see,[86] many " specific " sales were treated as sales by description and rejection was allowed. But if the " passing of the property " had been so insuperable a theoretical hindrance, such a development could hardly have been possible.

6. " Sale by Description " Reconsidered. One of the important results of (especially) Lord Abinger's judgment in *Chanter* v. *Hopkins* (1838) [87] was the introduction of the theory of sale by description. This theory had (and indeed still has) one advantage and one disadvantage. The advantage was that the " sale by description " limited the applicability of the doctrine

[79] See, for example, the headnote to *Dawson* v. *Collis*, 10 C.B. 523. Observe that " condition " is here used in two completely different senses: (i) total failure of consideration; and (ii) a stipulation in the contract expressly providing for a right of rejection.

[80] (1867) L.R. 2 Q.B. 580, at 587.

[81] Chalmers, *op. cit.*, 60.

[82] See § 10, *infra*.

[83] Williston, " Rescission for Breach of Warranty " (1903) 16 Harvard L.R. 465, at 472.

[84] See ss. 41, 44, 48 (3) of the Act.

[85] The whole concept of title in the contract of sale has been brilliantly discussed by K. N. Llewellyn, " From Title to Contract and a Bit Beyond " (1938) 15 New York L.Q.R. 159. See also my article, " The Ambiguity of Promise," 47 Northwestern University L.R. (formerly Illinois L.R.) 1 at 3–5.

[86] See § 8, *infra*.

[87] 4 M. & W. 399. See § 4, *supra*.

in *Street* v. *Blay*, simply because " sale by description " was never clearly defined. The disadvantage was that " sale by description " emerged as a special category of sale wholly distinct from the sale of specific chattels.

To illustrate the last point, we must deal with a trilogy of cases which established the description-theory in its modern form, and upon which section 13 of the Sale of Goods Act is based. The first is *Nichol* v. *Godts* (1854),[88] in which the plaintiff sold to the defendant " foreign refined rape oil . . . warranted only equal to samples." The defendant buyer refused to take it because what the plaintiff delivered was not " foreign refined rape oil " but a mixture of hemp and rape oil. Since the seller's warranty extended only to the sample which he had shown to the buyer, and since the oil he actually supplied corresponded to that sample, he argued that he had fully performed his contract so that the buyer had no option to reject, although he admitted that the sample was not " foreign refined rape oil." The court held for the buyer on the grounds, first, that the purchaser was only bound to take the goods as described, and, secondly, that the samples referred " only to quality." Thus, Pollock C.B. argued that the oil must not only correspond with the samples in quality, but must also " agree with the description of the contract of it as to its character." [89] And Parke B. said: " The warranty affects only the quality, but not the *nature* of the *article itself*." [90]

The next case is *Wieler* v. *Schilizzi* (1856) [91] where the plaintiff had bought a specific cargo of " Calcutta linseed *tale quale*." It was then discovered that the linseed contained a large admixture of foreign seeds which rendered the linseed unmarketable as Calcutta linseed. The jury was asked whether this admixture had altered the " distinctive character " of the linseed and they returned a verdict for the plaintiff. On a motion for a new trial, the court refused to disturb the verdict. " The purchaser had a right," Willes J. said,[92] " to expect, not a perfect article, but an article which would be saleable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did *not get what he bargained for*." [93]

In *Josling* v. *Kingsford* (1863) [94] the facts were rather similar. The buyer bought oxalic acid, the samples and the bulk of which his servant had examined, but it was later found to contain a 10 per cent. admixture of sulphate and magnesia. This, however,

[88] 10 Ex. 191; 23 L.J.Ex. 314. The decision seems to have been so revolutionary that its correctness was at first doubted, see the remarks by counsel in *Josling* v. *Kingsford* (1863) 13 C.B.(N.S.) 447, at 456.
[89] *Ibid.*, at 193.
[90] *Ibid.*, at 195. My italics.
[91] 17 C.B. 619.
[92] *Ibid.*, at 624.
[93] My italics.
[94] 13 C.B.(N.S.) 447.

could not have been detected by mere inspection and was only discovered after an analysis. The buyer then sued in damages for breach of contract, and (alternatively) for breach of warranty, although the seller had expressly refused to assume any responsibility for the strength of the oxalic acid. Erle C.J. directed the jury that there was no evidence of any warranty, but that the seller could only perform his contract by supplying such oxalic acid which might properly be said to come within the description of oxalic acid. On a motion for a new trial, the court refused to disturb the jury's verdict in favour of the buyer, and Williams J. said [95]: "However completely the defendant may have guarded himself against the contracting that the thing was of any particular quality, it is not possible to construe the contract in any other way than that it was a part of the agreement that the subject of the sale should be the oxalic acid of commerce."

The results of this trilogy were profound and far-reaching. In the first place, they completed and crystallised the bifurcation of the law of sale of goods. Whereas in the sale of a specific chattel only complete worthlessness, *i.e.*, total failure of consideration, would entitle the buyer to reject, in a sale by description even a partial failure of consideration would give rise to such a right. This was not merely the corollary to the rule in *Street* v. *Blay*,[96] but was also the outcome of the "higher" view that was now taken of sale by description. For it seemed to be assumed that there was some metaphysical connection between the "description" of the goods and their "kind," "nature," "distinctive character" or "identity"; the warranty, on the other hand, only affected "quality" and not the "nature" of the article itself.[97] It became therefore quite natural to look upon merchantability as part of the "description," since "unmerchantable" goods could be regarded as not answering their true "nature," "character" and so on.[98] In the second place, the bifurcation of the law also established the completely wrong antithesis between the condition on the one hand and the warranty on the other. Indeed, Lord Blackburn regarded *Josling* v. *Kingsford* [99] as "a striking illustration of the distinction" between the two.[1] The explanation was that in the sale by description, the seller's statements (*i.e.*, promises and representations) with regard to quality were now called "conditions," whilst similar statements became mere "warranties" in the sale of a specific chattel. But there was

[95] *Ibid.*, at 457.
[96] (1831) 2 B. & Ad. 456; see § 5, *supra*.
[97] See the statement by Parke B. in *Nichol* v. *Godts* (1854) 10 Ex. 191, at 195; cited p. 439, *supra*.
[98] "In all, it seems to me, it is either assumed or expressly stated, that the fundamental undertaking is, that the article offered or delivered shall answer the description of it contained in the contract," *per* Brett L.J. in *Randall* v. *Newson* (1877) 2 Q.B.D. 102, at 109.
[99] (1863) 13 C.B.(N.S.) 447.
[1] Blackburn on *The Contract of Sale*, 2nd ed., 210.

no difference between these two descriptive statements; and, hence, there was, in this context, no difference also between conditions and warranties as such. The difference only arose because of the non-rejection-rule established by *Street* v. *Blay* as well as the rule, for which *Barr* v. *Gibson* (1838) [2] was responsible, *i.e.*, that in the case of specific chattels a special or collateral warranty was required to exclude *caveat emptor*. In other words, the antithesis between conditions and warranty resulted from the telescoping of two quite different doctrines, one relating to the *effect* of a descriptive statement and the other relating to the absence of an implied-by-law warranty of quality in the case of specific chattels.[3]

Thirdly, the result of the above "description" cases was important also in another way. It will be observed that the argument in these decisions, *i.e.*, that the goods did not answer the description, was really begging the whole question. For (to take but one example) the Calcutta linseed *did* answer the description of "Calcutta linseed tale quale," the seller having sold not an ideal type of linseed but a cargo of so-called linseed or linseed such as it was. The seller's liability, therefore, could not rest on the ground that the goods did not correspond to their actual description. The liability could only be explained by saying that the buyer was supplied with goods which in the given circumstances happened to be not merchantable at all. This, however, amounted to no more than to a rather daring and dangerous extension of the implied warranty of merchantability combined with a pretty substantial restriction of the seller's freedom to contract.

These cases also raise another difficulty connected with some aspects of the sale by sample which will briefly be referred to at a later stage. For we must now deal with a rather more fundamental problem, *i.e.*, what does the concept "description" actually describe?

7. Description, Acquaintance, Identity and Sample.[4] A buyer may have knowledge of the article he purports to buy in two rather different ways. In the first place, he will know the subject-matter of the sale by *acquaintance*, *i.e.*, by being directly aware of it; or he will know the subject-matter by *description*, *i.e.*, when he is not aware of it and when all he knows about it is based on the description of the goods. More particularly, the buyer will know the goods by acquaintance in the following three instances:

[2] (1838) 3 M. & W. 390; 7 L.J.Ex. 124.

[3] See on all this, § 4, *supra*.

[4] I have tried to utilise in this discussion some of the principles of modern logic, *i.e.*, the distinction between knowledge by acquaintance and knowledge by description. This distinction was first conceived of by Bertrand Russell, see *Problems of Philosophy*, pp. 69 *et seq.* I have, however, followed the late Professor Susan Stebbing's slightly modified (as well as rather simpler) treatment of the subject; see her *Modern Introduction to Logic* (6th ed., 1948), chaps. III and IX.

(i) the buyer buys *this* object, pointing at it directly;
(ii) the buyer buys an object directly before him, but referring to it by a name;
(iii) the buyer buys an object by way of a sample, *i.e.*, he buys this quality or kinds of the goods.

There is, in fact, no real difference between (i) and (ii); furthermore, it does not usually happen that a buyer will buy merely by pointing his fingers at what he wants without referring to the object by means of a name. It follows that instance (i) is extremely rare, and may for present purposes be disregarded. As for (iii), the parties must at least use some descriptive symbols to determine the *quantity* of the quality agreed on; but as far as the quality of the goods is concerned, the buyer buys (subject to a later qualification) *that* quality, *i.e.*, the quality of which he is directly aware.

On the other hand the buyer will know the goods he is buying by description when he either is not or cannot be aware of them, *i.e.*, in the following three instances:

(iv) the buyer buys a definite object, *e.g.*, the horse "Constantine" which he has never seen;
(v) the buyer buys *a* horse, the seller having many horses;
(vi) the buyer buys a horse as yet unborn or non-existing.

In these three instances the buyer is not, and cannot be (as in (vi)), acquainted with the horse; and it is therefore clear that whatever knowledge the buyer may possess of the objects he is buying he can only have by way of description.[5]

Now what does this classification show us? It shows us that the word "description" is here used principally for the purpose of "identifying" the subject-matter of the sale. Let us first take instance (ii). Here the buyer uses a name, but merely for his and the seller's convenience; he could just as well have referred to *this* or *that*. Now let us consider instance (iv). Although the horse "Constantine" is in law a specific, ascertained and existing chattel because there is only one Constantine, and no other, to which the word "Constantine" applies, the buyer's knowledge of this particular horse is based on description, and on description only. For he does not, and *ex hypothesi* cannot, know the horse called "Constantine" otherwise than by the description(s) about the horse which the seller (or someone else) has given him.[6] And what has just been said about (iv) applies even more strongly to (v) and (vi).[7]

[5] The point is that it is such a descriptive statement as may be understood even "without knowing whether there is anything that may be described by it, and we could use it significantly even if we believed that there was nothing to which the phrase applied," Stebbing, *op. cit.*, chap. III, s. 2.

[6] As we shall later see (§ 8, *infra*) it was never quite certain whether this situation amounted to a sale of a specific chattel, or to a sale by description. See, *e.g.*, the discussion in *Bannerman* v. *White* (1861) 10 C.B.(N.S.) 844.

[7] According to Professor Williston (1 *Sales*, s. 224), the word description should be confined to identification especially when reference is made to a

There is, however, the important difference between (iv) on the one hand, and (v) and (vi) on the other. Whereas in (iv) the description "identifies" the horse "Constantine" completely, in (v) and (vii) the objects are only identified by reference to a class. For plainly, you cannot identify *a* horse; you cannot identify an unascertained or non-existing horse; all that we can identify is *the* horse, *e.g.*, the horse "Constantine." Lastly, let us consider instance (iii). There, it can easily be seen, the sale is both descriptive and demonstrative; it is demonstrative with regard to quality, and descriptive with regard to quantity. (iii), Therefore, stands midway between (ii) and (iv).

We have so far only been considering the word "description" in the broad sense of "identification." For in order to make a promise meaningful, the parties must promise to buy and sell *something*. And they cannot merely refer to "goods" as such; they must specify the goods to achieve a "certainty of terms," although "certainty" must here be understood in a very relative sense. It is with this aspect alone that the "identification" of the goods is concerned.

There is, however, a further aspect which does not relate to the knowledge of things or objects, but to the knowledge of *truths* about things or objects. Suppose A sells beans to B, adding that they are "good and edible." These beans the buyer knows either by acquaintance or by description inasmuch as he may be aware of a specific bag of beans, or only knows by description a specific, or unascertained, or even as yet non-existing bag of beans. Although he thus knows to which particular bag of beans in the world reference is made (and in the case of unascertained or non-existing goods, he will not even know this) this knowledge does not tell him anything about the quality of the beans. For the description "beans" only denotes the class of beans, including good, bad and indifferent beans. We do not have another name for "bad beans"; we do not classify them, or think of them, as "no-beans"; we call them beans and add that they are rotten.

Assuming that the buyer does not examine the beans, the only knowledge of their quality he will have is what the seller told him. But this is a different sort of "description," *i.e.*, a "description" which asserts some truth about the beans, which assertion may be either true or false. About certain qualities, the buyer may of course have knowledge by acquaintance. Thus he may be directly

class and not to a specific thing. Professor Prosser, "The Warranty of Merchantable Quality" (1943) 21 Can.B.R. 446, at 470–2, strongly disagreed with that view. We shall later see that "description" may mean both "identification" and "warranty." For a rather different analysis of the meaning of description, see Montrose, "The Operation of Description in a Contract of Sale of Goods" (1937) 16 Can.B.R. 760, where it is argued that descriptive words operate either as a definition of the contract goods, or as a condition, or as a warranty. But the criteria for distinguishing these operations are, it is submitted, not made very clear.

acquainted with their external features, their shape, size and colour, though he may know nothing about their edibility. In other words, a buyer may have knowledge, both by description and acquaintance of the truths or qualities of the goods. But where the buyer buys an article on his own knowledge by acquaintance, he cannot complain that the article is not the one he bought; where, on the other hand, he buys on knowledge by description, the responsibility must be the seller's, the buyer having relied on the latter's description rather than on his own knowledge. There is one exception to this. Even though the buyer may, of a given article, have neither knowledge by description nor by acquaintance, the seller is still compelled to give an article of " merchantable " quality.

Two other situations present somewhat greater difficulty. First, suppose that a buyer is confronted by a bag of beans about which the seller asserts that they are edible, but which the buyer has an ample opportunity to examine for himself, *i.e.*, he has an opportunity to get his own knowledge by acquaintance. Is he obliged to get that knowledge? Or is he entitled to rely on his knowledge by description? Although I shall refer to this particular problem at a later stage,[8] the better view seems to be that mere opportunity is irrelevant, and what matters is whether the buyer actually has knowledge by acquaintance or not. Secondly, an apparent conflict may arise between knowledge by description and knowledge by acquaintance. Thus, where a buyer buys a commodity by sample, the seller describing it as " X," although, unknown to either party, the sample represents commodity " Y," the buyer buys *that* quality (as shown in sample), and the seller should only be liable for that quality, whether it is called " X " or " Y." For the buyer buys on his own knowledge by acquaintance, so that the responsibility should be fully his. Nevertheless, certain decisions which we have previously considered [9] seem to go against this proposition. What, then, is the explanation? The explanation, it is submitted, is simply that we use the concept " by sample " in a twofold sense, and that we have, therefore, two types of sale by sample: (i) where the buyer actually samples, inspects, and is fully acquainted with the quality he buys, in which case that quality, and no other is fixed as the subject-matter of the sale, and (ii) where the buyer still " samples " or " inspects " the commodity which the seller offers, which process of sampling or inspecting, however, reveals to him only the external qualities of the commodity in question. As regards its latent qualities or defects the buyer has no personal knowledge by acquaintance, but has to rely on the knowledge by description, if any, given by the seller. This explanation ties up, once the matter is given a little thought, with

[8] See § 9, *infra*.

[9] *Nichol* v. *Godts* (1854) 10 Ex. 191; 23 L.J.Ex. 314; *Wieler* v. *Schilizzi* (1856) 17 C.B. 619; *Josling* v. *Kingsford* (1863) 13 C.B.(N.S.) 447.

the view previously referred to, that mere opportunity of knowledge by acquaintance is not enough, and that the decisive factor is the buyer's actual possession of such knowledge.

This analysis shows us several things. In the first place, it shows that the distinction between sale by description and sale by specific goods contains a completely false antithesis. For this distinction is based upon the further distinction between identified and non-identified goods. But, as we have seen, the logical antithesis, so far as it goes, is not between specific and described goods, but between goods identified, wholly or partly by description, and goods identified by acquaintance. In the second place, the above distinction also breaks down with regard to the truths or qualities of the goods. For knowledge of them does not depend upon whether an article is specific, *i.e.*, "identified," but simply upon whether the buyer has actual knowledge of the quality (or qualities) of the goods concerned by acquaintance or has to rely on that knowledge by description. As regards the latent defects of an article, a buyer is in exactly the same position whether he buys it specifically or in a sale by description. There is thus no necessity of deciding whether description means "identification" or "descriptive statement" of the goods. By limiting the meaning of "identification," every statement about the goods becomes a part of its description; in this way, moreover, it is also no longer necessary to distinguish between "identity" and "quality."[10]

The logical analysis here presented pinpoints the exact problems with which, so far as defective quality is concerned, the law of sale of goods constantly has to deal. Actually, all these problems the concept of warranty was (and is) quite capable of solving; and, indeed, had the law of warranty been allowed to develop along straightforward and consistent paths, most of the frightful complications which the law now faces would never have arisen.

Samuel J. Stoljar.[11]

(*To be concluded.*)

[10] The analysis here suggested may also throw some light upon the law of mistake in the law of contract. A discussion of this, however, would obviously lead too far.

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INVESTOR PROTECTION IN THE U.S.A.

The U.S. Securities and Exchange Commission (S.E.C.) has aroused widespread interest both as an administrative agency with the widest executive, legislative and judicial functions, and as a method of tackling the many pressing problems of securities regulation. Much has been written on it in America, and in England two informative articles have been published in this *Review*.[1] Hitherto, however, there has been no thorough treatment of the body of law and practice which has resulted from its work. Such a treatment is now available in Mr. Loss' monumental and exhaustive treatise.[2]

Mr. Loss' qualifications for writing the book are unique. He has been a member of the Commission's legal staff for 15 years ending as second-in-command of the legal department. In addition he has at Yale undertaken pioneer teaching on its work and is now a Visiting Professor at Harvard. This combination of practical and academic experience, harnessed to the research facilities of the great American law schools, gives him advantages the like of which are, alas, never possessed by English textbook writers, and he has made the best use of them. The result is a book which is of absorbing interest not only to company lawyers but also to those concerned with public administration, company organisation in all its aspects, and the marketing of stocks and shares. To those Englishmen who, like the writer, approach American legal literature with some suspicion, fearing that it will confirm their growing belief that it is a myth to suppose that England and America talk the same language, the book is especially recommended; it is written in what we are pleased to call " the King's English " (presumably it should now be the Queen's ?) but what, Mr. Loss would doubtless retort, is equally entitled to be known as " the President's American." And not only is it well written; it is entertainingly written with welcome touches of humour and irony. As one example of the author's agreeable style may be quoted his fascinating description (at pp. 314 *et seq.*) of various " Alice-in-Wonderland " investment schemes, the catalogue of which is, as he says, " as variegated as the imaginations of promoters. Many of them involve animals, preferably of either a fecund or a fur-bearing variety. A person ' sells ' pairs of silver foxes, for example, with the idea that he will supply the expert care (for a charge, of course)

[1] See E. Merrick Dodd in (1942) 5 M.L.R. 174, and (1947) 10 M.L.R. 255.

[2] *Securities Regulation* by Louis Loss. Associate General Counsel, Securities and Exchange Commission, Visiting Lecturer in Law, Yale University, Professorial Lecturer in Law, the George Washington University. [Boston: Little Brown & Co. 1951. pp. xxvii and 1283. $17.50.]

and in due time nature will supply lots of pups—one is tempted to say ' a true stock dividend.' " [3]

The S.E.C. administers six Federal statutes. The first of these, the Securities Act of 1933, is mainly concerned with public issues. The second, the Securities Exchange Act, 1934, has three basic purposes: to afford disclosure to buyers and sellers of securities: to regulate dealings and dealers, both over-the-counter (much more common and important in the States than here) and on stock exchanges; and to control the amount of the nation's credit which flows into the stock markets. The third, the Public Utility Holding Company Act, 1935, is designed to break up the over-concentration of economic power in monopolistic groups of holding and subsidiary gas and electricity utilities and to remedy the attendant evils. The fourth, the Trust Indenture Act, 1939, controls the contents of debenture trust deeds. The fifth, the Investment Company Act, 1940, regulates Investment Trust Companies and Unit Trusts, and the last, the Investment Advisers Act of the same year regulates investment advisers and their practices. In addition the Commission has important functions under Chapter X of the Bankruptcy Act, 1938 (which in the States covers company's winding-up), in assisting the court in connection with company reconstructions.

It will therefore be seen that this legislation covers much of the ground dealt with in England by the Companies Act, the Prevention of Fraud (Investments) Act, 1939, and the Borrowing (Control and Guarantees) Act, 1946, and that the S.E.C. fulfils some of the functions of the Board of Trade, the Capital Issues Committee and the Companies (Winding Up) Department of the High Court.[4] But the greater part of its functions is not in England covered by any legislation or exercised by any public authority, but left to the private control of the stock exchanges and the issuing houses. Mr. Loss rightly comments on the apparent anomaly that U.S.A., the arch-apostles of private enterprise, should have resorted to public control while Socialist Britain (he wrote before the General Election but we remain Socialist by American standards) should have left so wide a field free from State control. It is easy to explain this anomaly by the cynical observation that company promoters in the States have proved so much more " enterprising," but this is an over-facile explanation. In truth, as Mr. Loss points out (at p. 120): " The financial problems in a compact country with a relatively small investor class like England cannot be compared with those faced by a vast country like the United States with a continually expanding economy and an investing public

[3] At p. 319. And note also his reference (at p. 80) to the " odd coincidence whereby one of the houses specialising in the activity in Imperial Russian Bonds on the New York Curb in 1945, was named Karl Marks & Co."

[4] Perhaps (because of the Holding Co.'s Act) one should also add the Monopolies and Restrictive Practices Act and the Monopolies Commission.

which is much larger in both absolute and relative terms. . . ." Even if the States enjoyed " the British genius for unwritten law " which enables us, as Mr. Loss says (at p. 237) " to determine many phases of public policy by resorting to extra-legal techniques," it is obvious that simple geography and complicated Federalism would have precluded them from relying on our solutions. A solution of their problem might have been attempted in a Federal Incorporation Act (such as they have in Canada) but instead incorporation has been left to the States and Federal protection of investors superimposed. In general, though by no means completely, this Federal legislation only affects companies and dealers who use the mails or channels of inter-State commerce. What is said hereafter must be read in the light of this basic limitation, which, however, is not of over much importance since use of the mails is hardly to be avoided in the type of transactions concerned.

The book deals mainly with such parts of the statutes (and the body of law and practice which they have produced) as relate to the regulation of securities. Valuable comparative references are made to the practice of other countries (particularly England and Canada) and the background of common law and of the States " blue-sky " statutes is sketched in in some detail. So far as concerns the regulation of public issues (mainly dealt with by the 1933 Act) the principle adopted has been that of disclosure borrowed from the prospectus provisions of the English Companies Acts. But there is one vital difference; whereas our Registrar of Companies does not attempt to verify the truth of the statements made in the prospectus, the S.E.C. does so with the greatest thoroughness and can stop the registration and the issue if not satisfied. To an American observer our practice must seem incredibly lax, but the point is, of course, that a similar scrutiny is made, but that we leave it to private agencies (the stock exchanges and, especially, the issuing houses). Having regard to the high standards of integrity and thoroughness to which the London issuing houses have now attained it is doubtful whether any advantage to be achieved by expanding the powers of the Board of Trade would be commensurate with the public expense entailed. Indeed, as Mr. Loss points out (at p. 125) the fact that a public agency has scrutinised the prospectus to ensure full disclosure has the disadvantage that it is apt to mislead the investor into supposing that the State has passed judgment on the merits of the investment—a similar consequence is liable to ensue in this country from Treasury consent. Of more interest is the question, which the book poses, of whether either country will be able to rely indefinitely on a policy of mere disclosure; there are powerful schools of thought in both continents which, in the words of Mr. Justice Douglas of the U.S. Supreme Court (and sometime chairman of S.E.C.),[5] hold that

[5] In an article in (1934) 23 Yale Rev.(N.S.) 521, summarised by Mr. Loss at pp. 78–81.

" those needing investment guidance will receive small comfort from the balance sheets, contracts, or compilation of other data. . . . They either lack the training or intelligence to assimilate them and find them useful, or are so concerned with a speculative profit as to consider them irrelevant." According to this view, the disclosure principle, to which the laws of both countries are still wedded, is based on an out-moded nineteenth-century philosophy. To quote again from the justice : " We must perfect a plan for control of our present forms of organisation so as to harness the instruments of production not only for the ancient purpose of profit but also for the more slowly evolving purpose of service in the sense of the public good." It is interesting to find a judge of the U.S. Supreme Court echoing the words of Mr. Mackenzie King [6] in Canada, and Lord Eustace Percy,[7] Mr. Goyder [8] and a number of Socialist writers [9] in England. To some extent, indeed, the S.E.C. Statutes transcend the disclosure philosophy; as Mr. Loss points out (at pp. 175–8) in exercise of the Commission's power to accelerate approval of a registration without waiting the full 20-day period, they have in fact evolved a sanction to secure the deletion of features in the issue of which they disapprove, although this has, as yet, stopped far short of passing on the economic merits. In England, the virtual monopoly of new issues now enjoyed by a few issuing houses of high standing, which dare not forfeit their reputations by backing an unsound scheme, has, in practice, probably gone even farther.

But while it may be that the S.E.C. practices are unlikely to teach us much of immediate practical value so far as new issues are concerned, it is clear that in other respects we can learn valuable lessons from their experience. The following matters would seem to be particularly worthy of consideration when the next Company Law Amendment Committee is set up, and one of the most useful features of Mr. Loss' book, so far as this country is concerned, is that it makes the American material readily accessible to the English reformer.

(1) *Debenture Trust Deeds.* The Trust Indenture Act, described at pp. 417–446, seems to have gone some way towards making trustees for debenture-holders really active supervisors instead of agencies which perform a largely mechanical book-keeping role until prodded into activity by the debenture-holders. In England, both the legal provisions of the Companies Act and the rules of the London Stock Exchange seem perfunctory in comparison. The Cohen Committee in fact expressed dissatisfaction on this score and

[6] *Industry and Humanity* (Boston, 1918), and *The Four Parties to Industry* (Toronto, 1919).
[7] *The Unknown State*, Chap. 3, Sect. 2 (London, 1944).
[8] *The Future of Private Enterprise* (Oxford, 1951).
[9] G. D. H. Cole, in the *New Statesman*, May 12, 1951. and Albu and Hewitt, *The Anatomy of Private Industry* (Fabian Research Series, No. 145).

agreed that "the use of the term 'trustee' may well lead the debenture holder to the belief that he is getting more effective protection than is the fact,"[10] but beyond barring indemnity provisions[11] they did nothing about it. The rules of the London Stock Exchange admittedly go somewhat farther but contain nothing comparable to the American provisions for periodical reports by both the trustees and the companies.

(2) *Reconstructions.* Under Chapter X of the Bankruptcy Act the S.E.C. act as impartial representatives of investors and expert advisers to the courts in connection with the approval of schemes of arrangement (pp. 449–452). There can be little doubt that there is a pressing need for some similar agency in this country. The Companies Act contains a number of provisions whereby the approval of the court is or may be required.[12] English procedure, however, is singularly ill-equipped to place a judge in a position properly to pass judgment on the economic merits of a scheme and to make the valuations necessary before he can do so. Hence, in most cases, courts do little more than satisfy themselves that all the statutory formalities have been complied with[13] and then act as a rubber-stamp, salving their consciences by explaining that "the members and creditors are much better judges of what is their commercial advantage than the court can be."[14] This clearly was not the intention of the legislature which, more realistically, recognised that members are generally clay in the hands of their directors, and therefore provided for the court's scrutiny to protect them from their own apathy or stupidity. This protection having inevitably proved unsatisfactory, what is wanted, clearly, is some agency which will enable the court adequately to fulfil an unfamiliar inquisitorial role. In the States this agency has been found in the S.E.C. Whether the Board of Trade would be prepared to play a similar role is doubtful; there seems to be no good reason why it should not, for if its own resources are inadequate it could appoint an outside expert as it habitually does when ordering an inspection. Alternatively we might take a leaf out of Scotland's book and provide for direct reference by the court to an outside expert; this was recently done by the Court of Session on an application for reduction of capital under section 66.[15]

(3) *Control.* Mr. Loss has an interesting chapter (Chapter VII) on "Control" Concepts under the S.E.C. Statutes. The problem of adequately defining what constitutes control of a company is

[10] Cmd. 6659/45, para. 61.
[11] *Ibid.*, para. 64, and Companies Act, 1948, s. 88.
[12] *Ibid.*, ss. 5, 23, 57, 66–8, 72 and 206–9.
[13] In ensuring that full and adequate disclosure has been made, this, of course, fulfils a useful purpose.
[14] *Per* Lindley L.J. in *Re English Scottish and Australian Bank* [1893] 3 Ch. 385, at p. 409. For a recent example of this philosophy see *Re Press Caps* [1949] Ch. 434 (C.A.).
[15] See *Ex p. Westburn Sugar Refineries* [1951] A.C. 625.

one which has exercised the minds of draftsmen in this country—for purposes of both company and revenue law.[16] The definition in section 154 of the Companies Act is clearly not the last word, for it excludes from *de jure* control many situations in which *de facto* control is undoubtedly present. The definitions in the S.E.C. statutes and the judicial gloss placed on them go considerably farther than either the legislature or the courts have ventured in this country. For example, under the Investment Company Act a 25 per cent. holding of voting securities raises a presumption of control, while under the Holding Companies Act the percentage is as low as 10. Our Revenue and Board of Trade might profitably study the American practice.

(4) *Proxy Votes.* The Cohen Committee tried to increase the power of members over management by provisions regarding proxies,[17] but it can hardly be denied that while the management control the proxy-voting machinery their position is generally impregnable, and that the London Stock Exchange's requirement of " two-way " proxies has done little to weaken their hold. The S.E.C. Statutes and Regulations, on the other hand, appear to have gone some way towards making proxy voting an effective weapon in the shareholders' armoury instead of a shield for the directors. Not only are the proxy forms and circulars subject to rigorous control, but proxies must not be solicited until after a proxy statement (rather like a prospectus) has been filed, and approved, after scrutiny, by the Commission. These requirements in fact transcend the ordinary " disclosure philosophy " for, it seems, they tend to produce minimal standards of conduct for managements which are forced to bear in mind that their transactions will be brought into the light of public scrutiny in their next proxy statement. The rules also go considerably farther than our section 140 regarding the circulation of opposition motions and supporting material. If the management intend to solicit proxies they must on request furnish *any* shareholder entitled to vote with a list of shareholders or mail his material for him at his expense. This is similar to section 140 with the important distinction that the English shareholder has first to muster the support of one-twentieth of the voting rights or 100 members. Moreover, and this has no parallel in England, a shareholder unwilling to incur the expense of proxy solicitation can require the management to include his proposal in their own statement, giving, if they oppose it, the proposer's name and address and a statement of not more than 100 words of the reasons advanced by him in support of the proposal.

Mr. Loss' detailed account of these matters (at pp. 521–560) merits the closest attention. Whether it is either practical or

[16] For a brief account see Hornsey, *Some Aspects of the Law Relating to Company Control* (1950) 13 M.L.R. 470.
[17] Companies Act, 1948, ss. 136 and 137 (2).

desirable to introduce anything so elaborate into this country is questionable—it would scarcely be workable without a considerable expansion of the powers of the Board of Trade or the stock exchanges. Perhaps the feature which could most profitably be borrowed is that of a delay between the initial publication of the managements' proposals and the soliciting of proxies. The basic weakness of our present system is that before any opposition can be organised and expressed the management have generally received sufficient proxies in response to their circular to make their victory virtually assured.[18] It would be easy for the legislature to enact, or for the stock exchanges to insist, that proxies should not be solicited until the lapse of a prescribed period from the dispatch of notices, so that the financial press could have an opportunity to comment on the proposals and any opposition could organise itself. It would be even better to require that certain types of resolutions should need to be passed on a postal ballot and that voting papers should not be dispatched until after a meeting had been held and the proposals discussed. If this were done, meetings would produce a genuine debate instead of the present farce in which a handful of opposing orators harangue a complacent management secure in the knowledge that nothing that is said or left unsaid can affect the result. This proposal is unlikely to commend itself to commercial magnates or perhaps to be introduced by the stock exchanges on their own initiative, but if we are seriously determined to make managements the servants of members something of the sort seems essential. But are we serious? A strong argument could be raised to the effect that any efforts in this direction represent attempts to put the clock back, and that the time has come to recognise frankly that shareholders are merely lenders of capital and entitled to no more control over their debtors than any other creditors.

(5) *Share Dealings by Directors.* Since the calamitous decision in *Percival* v. *Wright*[19] it seems to have been assumed in this country that directors have, legally, *carte blanche* to put to personal advantage their inside information in dealings in their companies' securities. Most jurisdictions in the U.S.A. seem to have started from the same principle, that a director as such is not in any fiduciary relationship with members of the company but only with the company itself. Even at common law, however, they have, in practice, curtailed the director's licence by ruling that additional facts may easily convert a director into a quasi-trustee for the members: Mr. Loss gives an excellent account of this process at pp. 824 *et seq.* There is more judicial authority than is generally

[18] It would, of course, be possible for the members to withdraw their proxies but this rarely happens; investors are too proud to admit that they have made a mistake.

[19] [1902] 2 Ch. 421.

realised for a similar development in this country.[20] Moreover, *Percival* v. *Wright* is no authority on the position as between the director and the company, and the present writer has long held the view that agency principles are sufficiently elastic to enable the company to recover from the director any profit which he has made on share dealings as a result of the misuse of confidential information. In England no company has yet had the temerity to make such a claim, but one has successfully done so in the States.[21] In these respects the American material will be invaluable when similar questions come to be litigated and it is to be hoped that it will be used. Indeed, one may here comment generally on the astonishing failure of English practitioners to explore the American case law when novel points of company law are litigated; their case law (and, for that matter, their legal literature) is far richer than the English, but how rarely is it cited in the Companies Court.

The American common law developments, however, pale into insignificance compared with the regulations made under the S.E.C. Statutes. A director or other "insider"[22] is subject to attack from many sides.[23] He has to make an initial report of his holdings and to notify all changes, and these reports are available for public inspection both at the Commission and at the stock exchange (p. 562); this alone goes considerably farther than the English requirement of a register of directors' shareholdings which is only open to inspection by the Board of Trade, and, for a limited period, by members and debenture-holders.[24] Moreover, he has to account to the company for any profit made by a purchase and sale (or vice versa) within six months of each other and this irrespective of any actual abuse of his position (pp. 563–580). Mr. Loss says that this "is probably the most cordially disliked provision in all these statutes from the point of view of those whom it affects"[25] and one can well believe it. On the other hand it seems to have been remarkably effective, doubtless because any share or debenture-holder may maintain an action on behalf of the company, thus precluding the offender from sheltering behind the difficulties of a representative action and the rule in *Foss* v. *Harbottle*.

Nor is this all. Under a Rule of the Commission an "insider"[26]

[20] *Allen* v. *Hyatt* (1914) 30 T.L.R. 444 (J.C.).

[21] *Brophy* v. *Cities Service Co.*, a decision of the Chancery Court of Delaware (a state not noted for its strictness towards company promoters) noted by Mr. Loss at pp. 594–5 and commented on in (1950) 53 Harv.L.R. 1446.

[22] The regulations cover every officer, director and every person "who is directly or indirectly the beneficial owner of more than 10 per cent. of any class of any equity security" registered with the Commission.

[23] In addition to those mentioned in the text there is an absolute prohibition on selling "short": pp. 580–1.

[24] Companies Act, 1948, s. 195.

[25] p. 578.

[26] For this purpose the definition of "insider" seems to be even wider and to include anyone whose position has enabled him to acquire confidential information: see pp. 828–31.

is under a duty to make full disclosure of material facts when he buys or sells securities (pp. 827–844). If he does not, the other party has the usual remedies for fraud. As Mr. Loss points out (at p. 844) the apparent result of this and the former provisions is that an "insider" who makes a short-term profit may be subject to a double liability: to compensate the seller under this rule (and perhaps the buyer also?) and to account to the company for his short-lived profit. This is spoiling the Egyptians with a vengeance.[27]

These provisions of the S.E.C. Statutes have recently been given favourable publicity in the financial columns of some London newspapers. Sweeping though they are, they represent a serious and effective attempt to eradicate practices which no longer accord even with the somewhat elastic notions of commercial morality. Our law (at any rate as at present understood) is seriously out of step with public feeling. This was recognised by the Cohen Committee, but the registration of directors' shareholdings, which was all that finally resulted from their deliberations, was but a halting and inadequate step towards a remedy. In any future measure of reform the S.E.C. solution will clearly require serious consideration. If it be objected that such stringent provisions would discourage directors from holding any shares in their companies, the answers are: first, that it does not seem to have had this effect in the States, where, on the whole, directors appear to retain far greater stakes in their companies than in England, and secondly, that perhaps this would in any case be the lesser of two evils, if an evil at all. Shareholdings by directors are only valuable from the point of view of the company and other members if they are really substantial. In England today this is rarely the case with large public companies, and the financial incentives which cause directors to give of their best are their salaries and commissions rather than their holdings. The requirement of the London Stock Exchange that directors shall have a share qualification which is not merely nominal is in practice satisfied by a holding of as little as £100,[28] and this is just a nuisance to all concerned. Since economic conditions generally preclude the holding of a worth-while interest in the capital, there seems to be no reason why we should not concentrate on stopping the still prevalent practice of using inside information in gambles on the stock exchange, without bothering about the divorce between management and members, for that divorce is already absolute.

A more powerful objection is that unless nominee shareholdings are eradicated, which, it will be remembered, has hitherto been rejected as impracticable, share-dealings by "insiders" will escape detection. This argument presupposes that every director who is

[27] Any reader who is fortunate enough to be an English "insider" may be pleased to know that as yet no one has paid this supreme penalty.

[28] And this may be held as nominee for someone else!

prepared to earn a little on the side is also willing to tell a formal and deliberate lie for which he is liable to a fine—at present admittedly ridiculously small.[29] Moreover, it may be assumed that the reputable nominee companies would not be willing to lend themselves to an infringement, especially if they themselves were made liable,[30] and a director who operated through a disreputable nominee would be laying himself wide open to denunciation or blackmail. But even if some offenders escaped detection, the mere presence on the Statute-book (or, for that matter, in the stock exchange rules) of such powerful sanctions would have a valuable deterrent effect and, it may be assumed, even one successful action would cause many actual or potential sinners to see the light.

(6) *Civil Liabilities.* Mr. Loss has a long and absorbing Chapter (Chap. XIII) on the subject of civil liabilities generally, both at common law, under the States "blue-skies" laws, and under the S.E.C. Statutes. It will have been apparent from the foregoing that these liabilities are much more extensive than in England, but Mr. Loss comments (p. 988) on the relative paucity of civil actions for misrepresentation, accounted for, in his opinion, by the efficiency of the Commission's scrutiny of registration statements.[31] Perhaps the most interesting feature of the American scene from our point of view is the readiness with which the courts have held that breach of a statutory duty gives rise to civil liability towards an investor damnified thereby even although no civil remedy is expressly provided (pp. 1043–1071). There is obviously wide scope for a similar development in England in respect of breaches of the Companies Act and the Prevention of Fraud Act, but as yet we have scarcely started.[32] Here again the American material will be a valuable persuasive authority if and when we make a move. American law also seems much more ready to grant rescission as an alternative to damages; the English practice (as represented by section 43 of the Companies Act) is to restrict claims so far as possible to damages against the individual wrongdoers instead of granting a remedy against the company. The justification for our practice is that it protects creditors of the company; as Mr. Loss (p. 1111) points out, America has never wholeheartedly adopted the English and Continental conception of capital as a "trust fund" for the benefit of creditors. It is also clear that American law protects not only original subscribers but also those who purchase on the market in reliance on the prospectus

[29] £50: s. 198.

[30] Under the S.E.C. Rule even a broker who knows or suspects that he is acting for an "insider" may be liable to compensate the other party if disclosure is not made (see p. 839).

[31] In England the similar scrutiny by the issuing houses doubtless accounts for a similar dearth of recent decisions.

[32] *Cf. Re South of England Natural Gas Co.* [1911] 1 Ch. 573, and *Nash* v. *Lynde* [1929] A.C. 158.

statement. The English position in this respect is not too clear. Actions under section 43 are clearly limited to original subscribers, or those who acquire from an issuing house under an offer for sale (section 45). As regards common law fraud, *Peek* v. *Gurney* [33] is generally taken as authority for the proposition that there is normally no liability towards market purchasers, although *Andrewes* v. *Mockford* [34] recognises that this does not apply when the prospectus is intended to influence such purchases. It may be suggested, however, that under modern conditions the latter case represents the rule to which *Peek* v. *Gurney* is the exception. Since the prospectus will be published as an advertisement to lead to the grant of a stock exchange quotation, how can the issuers say that they did not intend it to influence purchasers on the market? They can hardly deny that they knew that it was likely to be relied on by such purchasers and they must be deemed to have intended the natural consequences of their acts whether they wished them or not. Here again the American authorities may one day prove valuable to the English advocate.

This account, although over-long for a book review, has only touched on some of the matters dealt with in Mr. Loss' fascinating work which are of particular interest to the writer. Little or no reference has been made to the detailed accounts of the control exercised over stock-brokers and dealers (jobbers) and investment advisers, or to the measures designed to prevent market manipulation; those more familiar with the seamier side of stock-broking and share-pushing must be left to comment on this aspect of the work. As, however, reference has been made to the contrast between England's reliance on extra-legal techniques and private agencies and the American resort to State control, attention should be drawn to an experiment in co-operation between S.E.C. and a representative association of brokers and dealers—the National Association of Securities Dealers Inc. (N.A.S.D.)—which approaches much more closely to the English solution exemplified in the co-operation between the Board of Trade and the stock exchanges.[35]

Nor has anything been said of the final chapter, which explains the Commission's organisation and procedure, and which will undoubtedly interest constitutional and administrative lawyers. It will have been apparent that the Commission's rule-making and judicial powers are far greater than those exercised by the Board of Trade or any other body in the English commercial sphere. The only respect in which the Board has greater powers concerns inspections, and this is very much a *tabula in naufragio* so far as investor protection is concerned. The Commission is, however, subject to a

[33] (1873) L.R. 6 H.L. 377.
[34] [1896] 1 Q.B. 372 (C.A.).
[35] *Cf.* Companies Act, 1948, s. 39.

much closer judicial review than that enjoyed (if that is the right word) by most English administrative agencies.

This inadequate account should, however, have indicated how much of interest to the English reader Mr. Loss' book contains. It is only regrettable that its price may prevent its having the circulation on this side of the Atlantic that it deserves.

L. C. B. Gower.[36]

[36] Sir Ernest Cassel, Professor of Commercial Law in the University of London.

A RE-EXAMINATION OF REMOTENESS

RECENT dicta of the Court of Appeal in *Thorogood* v. *Van den Berghs and Jurgens, Ltd.*,[1] have reopened the thorny problem of remoteness of damage in tort. As leave to appeal to the House of Lords has been granted, this may be a convenient time to survey not only the conflicting theories on the test for remoteness of damage in tort, but also the corresponding liability in contract, since attempts have been made to link the two into one general principle. The object of the present paper is to trace the development of the remoteness rules in contract and tort, to establish that the contractual rule is based on foreseeability while the tortious rule is based on directness, and to show that on both authority and principle there is no connection between the two rules.

The question of assessing damages for breach of a legal duty, whether in contract or tort, depends upon the solution of three problems, each of which must be dealt with independently.

(*a*) Is there a breach of legal duty? This may consist of either a breach of contract or the commission of a tort. Until this question has been answered in the affirmative, all questions of remoteness of damage are irrelevant. This problem has never caused great difficulty in contract, but has been the source of much confusion in tort, and especially with reference to the tort of negligence. It is essential to decide at the outset whether a legal duty has been broken before discussing what damage has been caused by it. Lord Wright stresses this point in *Bourhill* v. *Young*.[2] 'The question of liability is anterior to the question of the measure of the consequences which go with the liability."[3]

(*b*) Secondly, in respect of what consequences of an established breach of duty can the injured party recover? This is simply an occasion for the application of the rules of remoteness of damage and it is the contention of the writers of this article that the same test is not applicable both to torts and to breaches of contract. Despite judicial dicta to the contrary, it is submitted that the test is one of "foreseeability" in contract, and one of "directness" in tort.

(*c*) Thirdly, how much compensation can the injured party recover for consequences of the breach of legal duty which have already been held to be not too remote? Only when

[1] [1951] 2 K.B. 537.
[2] [1943] A.C. 92 at p. 437.
[3] See also *per* Lord Porter in *Woods* v. *Duncan* [1946] A.C. 401 at p. 437. "No question of measure of damages arises here. . . . Your Lordships are concerned with the earlier question whether these defendants were negligent."

a decision has been made as to what consequences are sufficiently proximate for compensation can the rules as to measure of damages be applied. Thus in the words of Lord Esher M.R. in *The Argentino*,[4] "This rule does not come into play with regard to any claimed head of damage until it has been determined by the rule as to remoteness whether that head of damage can be brought into consideration at all." It is generally agreed that the rules of contract and tort are at one in accepting the principle of *restitutio in integrum* as the basis of measure of damages, although in tort the principle is somewhat more difficult to apply in cases of personal physical injury.[5] Thus Scrutton L.J. remarks in *The Edison*,[6] "Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum*, subject to the qualification or restriction that the damages must not be too remote."

It is essential that these three questions should be answered separately and in the above order, for all too often in tort questions of remoteness are discussed before the breach of a legal duty has been established. The present intention is to examine the first two questions in relation to contract and tort, and, on the basis of the examination, to compare the respective rules as to remoteness of damage in the two branches of the law.

Contract

There are innumerable ways in which a contract may be broken, including express repudiation before or on the date when performance is due, implicit repudiation by non-performance, or by rendering performance impossible, or merely by breach of a condition or warranty. The court has to decide whether the conduct of the defendant amounts to a breach of contract, and it is not until it has answered this question that it considers what items of damage are not too remote for compensation, and applies the rule in *Hadley* v. *Baxendale*.[7] The fundamental division between these two problems has always been recognised in contract, and so we can immediately pass on to the test for remoteness of damage.

[4] (1888) 13 P. 191 at p. 196.

[5] Support for this proposition in relation to contract is found in *Wertheim* v. *Chicoutimi Pulp Co.* [1911] A.C. at p. 307, *per* Lord Atkinson; *British Westinghouse Electric Co.* v. *Underground Electric Rys.* [1912] A.C. at p. 689, *per* Lord Haldane; *Williams Bros.* v. *Agius* [1914] A.C. at p. 522, *per* Lord Haldane; *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* [1949] 2 K.B. at p. 539, *per* Asquith L.J.; *Monarch SS. Co.* v. *Karlshamns Oljefabriker* [1949] A.C. at p. 220, *per* Lord Wright. In relation to tort in *The Argentino* (1888) 13 P. at p. 200, *per* Bowen L.J.; *The Kate* (1899) P. at p. 162, *per* Sir F. Jeune.

[6] [1932] P. 52 at p. 62. See also *Admiralty Commissioners* v. *SS. Susquehanna* [1926] A.C. at p. 661, *per* Lord Dunedin.

[7] (1854) 9 Exch. 341.

Damages recoverable, in the words of Alderson B., are "such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." [8]

This test has been consistently applied in all contract cases during the past century and there can now be no doubt as to its authority. It is submitted that the underlying idea is plain. Since contractual liability is self-imposed, the parties can only be liable for the damage for which they have agreed to be liable. In most cases the parties do not expressly provide for the consequences of a breach, and the court, therefore, has to infer the extent of the liability which each party has undertaken. It can thus include only those items of damage which the defendant, in the words of Bovill C.J., "could have foreseen and reasonably expected and to which he has assented expressly or impliedly by entering the contract." [9] This interpretation has not been universally accepted. It has been suggested that the parties to a contract contemplate only its performance and not the consequences of its breach, the liability for which is imposed by the court *ab extra*.[10] But, if, as is generally admitted, liability in contract is self-imposed this liability must surely extend to the obligation to pay damages for its breach no less than to its performance.

This, at least, is the interpretation suggested by the great majority of the decided cases, and in assessing the parties' foreknowledge and agreement as to damages, the courts apply both objective and subjective tests. The former is reflected by the so-called "first branch" of the rule in *Hadley* v. *Baxendale* under which a party is liable for all damage arising naturally from such breach of contract itself, *i.e.*, according to the usual course of things. This branch of the rule renders a man liable for no damages beyond what a reasonable man could have foreseen, but no concessions are made for the party who proves that his foresight is not equal to that of the reasonable man. In addition, however, the courts may consider under the second branch of the rule not what the reasonable man would have anticipated, but what damages those particular parties in those particular circumstances foresaw and impliedly agreed to bear; in short, all particular items are recoverable which may be supposed to have been in the contemplation of the two contracting parties at the time of the

[8] *Hadley* v. *Baxendale* (1854) 9 Exch. 341 at p. 354.
[9] *British Columbia Saw-Mill Co., Ltd.* v. *Nettleship* (1868) L.R. 3 C.P. at p. 506. See also *Horne* v. *Midland Ry.* (1873) L.R. 8 C.P. 131 at p. 141, *per* Blackburn J.
[10] *Hydraulic Engineering Co.* v. *McHaffie* (1878) 4 Q.B.D. 670 at p. 674, *per* Bramwell L.J., at p. 677, *per* Cotton L.J.

contract. Asquith L.J. summarises the law in regard to remoteness of damage in contract in his judgment in the recent case of *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.*[11]

"In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as likely to result from the breach.

"What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

"For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and, consequently, what loss is liable to result from a breach of contract in that ordinary course. This is the breach of contract in that ordinary course. This is the subject-matter of the 'first rule' in *Hadley* v. *Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable."

This passage neatly illustrates the subjective and objective tests of knowledge applied by the court, but must be read subject to the rider, mentioned by Asquith L.J.,[12] that even actual knowledge of potential damage as a result of breach is not sufficient unless the defendant has agreed to bear it. So *per* Willes J. in *British Columbia Saw-Mills Co.* v. *Nettleship*, "the mere fact of knowledgment cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."[13]

No decision is at variance with this dictum, which has been constantly quoted with approval,[14] and indeed, it is submitted, lends added weight to the principle of agreement above enunciated.

If this statement of principle be correct, it is hardly surprising that there has never been any suggestion in cases of contract that

[11] [1949] 2 K.B. 528 at p. 539. Tucker and Singleton L.JJ. concurred in this judgment. See also *British Columbia Saw-Mills Co.* v. *Nettleship* (1868) L.R. 3 C.P. at p. 505, *per* Bovill C.J., *Patrick* v. *Russo-British Grain Export Co.* [1927] 2 K.B. at p. 538, *per* Salter J. It is also implicit in all the judgments in *Simpson* v. *L. N. W. Ry.* (1876) 1 Q.B.D. 274.

[12] At p. 538.

[13] (1868) L.R. 3 C.P. 499 at p. 509.

[14] See *Horne* v. *Midland Ry.* (1873) L.R. 8 C.P. 131 at pp. 133, 134, 139, *per* Martin B. at p. 141, *per* Blackburn J.; *Patrick* v. *Russo-British Grain Export Co.* [1927] 2 K.B. 535 at p. 540, *per* Salter J. See also note (13), *supra*.

the defaulting party can be made liable for direct consequences beyond those foreseeable by a reasonable man or by the parties themselves. The rigid application of the foreseeability test is also well illustrated by decided cases. From these it appears that the value of a broken promise is not its actual value to the promisee, but the value which a reasonable man, with the promisor's knowledge, would have estimated it to have. Thus the actual value of an article lost under a contract of carriage is not recoverable where it is unknown to the defendant,[15] nor the actual damage caused by the late delivery of the crankshaft in *Hadley* v. *Baxendale*. Again, damage caused by the loss of forward sales is irrecoverable where not known to the promisor.[16] Even where the promisor knows that a resale is intended, he will only be liable for a reasonable profit and not the actual profit, unless he is aware of the details of such resale.[17] So rigidly is the foreseeability test applied that damages for foreseeable loss can be recovered although such loss has been reduced by a forward sale at a price below the market price,[18] and even though no loss of the type foreseen has occurred.[19]

A study of these cases inevitably leads to the conclusion that the test in contract for deciding what damage is sufficiently proximate to the breach is based purely on foreseeability. The value of the broken promise is not its value to the party who desires its fulfilment, but its value to a reasonable man having the same actual knowledge of surrounding circumstances as the promisor. This basis of liability is only explicable on the footing that a party to a contract is not liable for loss beyond what he has contracted to bear. He can state his liability expressly, as in *Dunlop* v. *New Garage Co.*,[20] but in most cases the courts have to imply this agreement, and will accordingly render him liable for no damage beyond that which he could have foreseen.

Tort

In tort, no less than in contract, it is essential to keep distinct the three questions above postulated and to answer them in the correct order.

1. Has the defendant committed a breach of a legal duty, *i.e.*, has he committed a tort towards the plaintiff?

2. For what heads of damage resulting from this tort may the plaintiff recover?

3. How shall this damage be assessed in terms of money?

[15] *British Columbia Saw-Mill Co.* v. *Nettleship* (1868) L.R. 3 C.P. 499. *Cf. Hydraulic Engineering Co.* v. *McHaffie* (1878) 4 Q.B.D. 670.
[16] *Horne* v. *Midland Ry.* (1873) L.R. 8 C.P. 131. *The Arpad* [1934] P. 189.
[17] *Household Machines, Ltd.* v. *Cosmos Exporters, Ltd.* [1947] K.B. 217. See also *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* [1949] 2 K.B. 528.
[18] *Williams Bros.* v. *Agius* [1914] A.C. 510.
[19] *Cory Bros.* v. *Thames Ironworks* (1868) L.R. 3 Q.B. 181.
[20] [1915] A.C. 79.

The third question does not fall within the compass of the present article, but an attempt will be made to answer the first two questions.

1. Little difficulty has been experienced by the courts in determining whether a tort has been committed in cases of so-called "strict liability" where the defendant's foresight or state of mind is irrelevant. Under this heading are to be found such torts as libel, trespass, and conversion, liability for fire and the keeping of dangerous animals, and liability under the *Rylands* v. *Fletcher* principle. In such cases there is little temptation to confuse questions of liability and remoteness of damage, for the courts merely look at the act and not at the damage.

In contrast, however, a second class of tort exists in which the defendant's foresight of the consequences is an essential feature of the tort. The liability of occupiers for dangerous premises, liability for injurious falsehood and nuisance fall within this category, but foremost in the list comes the liability for negligence. The cases on the subject of remoteness of damage quoted by academic writers are almost exclusively drawn from the tort of negligence, and well illustrate the vital need in this sphere of distinguishing questions of liability from questions of remoteness. This distinction was recognised by the Court of Appeal in *Hambrook* v. *Stokes*,[21] for the court confined itself to a discussion of the extent of the defendant's duty of care, and the dissenting judgment of Sargent L.J. is based simply on disagreement as to the extent of that duty.[22] Again, in *Bourhill* v. *Young*,[23] the court confined itself to the question of whether a duty of care was owed to the fishwife, and did not discuss whether the damage to her was the direct consequence of the defendant's act. In the words of Lord Wright, "the question of liability is anterior to the question of the measure of the consequences which go with the liability."[24]

The present argument can be summed up in the words of Greer L.J. in *Haynes* v. *Harwood*.[25] "Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim." It is clear, therefore, that if it is desired to hold the defendant liable for damage caused by his act or omission, it is essential first to establish that his act or omission constitutes a tort towards the plaintiff, and this is true of negligence as of other torts. Thus, to accept the suggestion of Denning L.J.[26] that the decisions in

21 [1925] 1 K.B. 141.
22 *Ibid.* at p. 162. See also *per* Atkin L.J. at p. 158.
23 [1943] A.C. 92.
24 *Ibid.* at p. 109. See other dicta to the same effect, *per* Lord Wright at p. 108, *per* Lord Porter at pp. 116–7, *per* Lord Russell at p. 101.
25 [1935] 1 K.B. 146 at p. 152. See also *Woods* v. *Duncan* [1946] A.C. 401 at p. 437, *per* Lord Porter.
26 *Minister of Pensions* v. *Chennell* [1945] 2 All E.R. 719 at p. 721.

the *Palsgraf Case*,[27] *Bourhill* v. *Young* and *Woods* v. *Duncan*, have in any way affected the rules as to remoteness of damage, is to overlook the fact that in none of these cases could the plaintiff establish a tort committed towards himself.

2. When the breach of a legal duty has been established, the next step is to decide for what consequences of the breach the plaintiff can recover. Here, opinion is sharply divided between the view that the defendant should not be liable for consequences beyond those which he could foresee, and the view expressed in *Re Polemis* [28] that, "if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act." It will be seen that the first-mentioned test corresponds almost exactly with the rules as to remoteness of damage in contract laid down in *Hadley* v. *Baxendale*, and in consequence it has all too often been suggested that the rules in contract and tort are, in fact, the same.[29] Yet this view of the rule in tort remains based on certain dicta in nineteenth-century cases, while the totally different "directness" test propounded in *Re Polemis* finds continual support in modern cases, and even in those cases which are alleged to have thrown doubt upon its validity.[30] Lord Wright goes so far as to suggest that *Re Polemis* only reiterates existing law,[31] while the recent decision of the Court of Appeal in *Thorogood* v. *Van den Berghs and Jurgens, Ltd.*,[32] has lent added weight to the much criticised rule.

It is the submission of the present writers that the *Polemis Case* laid down the clearly correct rule for deciding questions of remoteness in tort, and that it is to be hoped that the essential distinction between questions of remoteness in contract and tort will at length be recognised by the House of Lords. The principle has been criticised on two main grounds:—

(a) It is said that it is inconsistent with previous authorities.

It has been suggested that the "directness" test is an innovation appearing for the first time in 1870 in the case of *Smith* v. *L. & S. W. Ry.*[33] This suggestion is in fact unfounded, for before this

[27] (1928) 248 N.Y. 339.
[28] [1921] 3 K.B. 560 at p. 577, *per* Scrutton L.J.
[29] *The Notting Hill* (1884) 9 P. at p. 113, *per* Brett M.R.; *per* Bowen L.J. in *The Argentino* (1888) 13 P. at p. 200, and in *Cobb* v. *G. W. Ry.* [1893] 1 Q.B. at p. 464; *per* Greer L.J. in *The Edison* [1932] P. at p. 68, in *The Arpad* [1934] P. at p. 216, and in *Haynes* v. *Harwood* [1935] 1 K.B. at p. 156.
[30] *Hambrook* v. *Stokes* [1925] 1 K.B. at p. 156, *per* Atkin L.J.; *G. W. Ry.* v. *Mostyn* [1928] A.C. at p. 91, *per* Lord Phillimore; *The Arpad* [1934] P. at p. 232, *per* Maugham L.J.; *Re Simms* [1934] Ch. at p. 7, *per* Lord Hanworth M.R.; *Woods* v. *Duncan* [1946] A.C. at p. 407, *per* Lord Porter; *Liesbosch Dredger* v. *Edison* [1933] A.C. at p. 461, *per* Lord Wright; *Morrison SS. Co.* v. *Greystoke Castle* [1947] A.C. at p. 296, *per* Lord Roche.
[31] *Bourhill* v. *Young* [1943] A.C. at p. 109.
[32] [1951] 2 K.B. 537.
[33] (1871) L.R. 6 C.P. 14.

date defendants had been held liable for damage which they could not have foreseen in cases of trespass, and many other instances of strict liability. Thus, in *Lee* v. *Riley* [34] the owner of a trespassing horse was expressly held liable for the direct consequences of the trespass even though they were not foreseeable, and this decision was followed in similar circumstances in *Ellis* v. *Loftus Iron Co.*[35] So *per* Lord Coleridge C.J.: "The only remaining question is whether the damages were too remote. I cannot see that they were; they were the natural and direct consequence of the trespass committed. . . . *Lee* v. *Riley* is a very strong authority for our present decision." [36]

In contradistinction to the torts of strict liability, however, negligence only emerged clearly as an independent tort in 1883 in *Heaven* v. *Pender*,[37] and did not become firmly established until *Donoghue* v. *Stevenson*.[38] It is not surprising that while the limitations of the tort were very vague there was also an absence of authority with regard to the question of the extent of the damage recoverable under it. There is a natural tendency in such cases to argue that, since no tort has been committed unless the defendant could foresee damage to the plaintiff as the result of his act or omission, the defendant could not be liable for damage beyond that which he could foresee. Certain obiter dicta of Pollock C.B. in *Rigby* v. *Hewitt* [39] and *Greenland* v. *Chaplin* [40] supported this view, but they were the only authorities in support of it at the time, and it is clear that the other members of the court in these two cases disagreed with them. The present submission is, therefore, that the court in *Smith* v. *L. & S. W. Ry.* were merely applying an already well-established general principle of liability in tort to the newly emerging tort of negligence.

It is true that certain dicta of three judges in *Smith* v. *L. & S. W. Ry.* went far towards suggesting that the defendants would have been liable for the destruction of the cottage even though they could have foreseen no damage to it. Thus, Kelly C.B. said: "It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it." [41] Such dicta

[34] (1865) 18 C.B.(N.S.) 722.
[35] (1874) L.R. 10 C.P. 10.
[36] *Ibid.* at p. 12.
[37] (1883) 11 Q.B.D. 503.
[38] [1932] A.C. 562.
[39] (1850) 5 Ex. at p. 243.
[40] (1850) 5 Ex. at p. 248.
[41] (1871) L.R. 6 C.P. at p. 20.

are clearly too broad if applied simply to the tort of negligence; but it must be remembered that in this case the defendant could foresee the consequence of fire arising from his act, and the old common law rule was that once a fire had been negligently started or allowed to spread, the negligent party was absolutely liable for the damage it caused.[42] It may well be that the judges in this case had the common law liability for fire in mind when making these much criticised dicta, a fact which goes far to explain why subsequent applications of the dicta have been confined to cases where the defendant could have foreseen some damage to the plaintiff's property.

Two other cases are often cited as being in conflict with the *Polemis* rule, of which one is *Sharp* v. *Powell*.[43] Here, it is argued that the injury to the plaintiff's horse was a direct consequence of the defendant's breach of a police regulation, and therefore that the decision conflicts with *Smith* v. *L. & S. W. Ry.* On investigating the case, however, it seems clear that all judges are agreed that it is not the direct consequence, due to a break in the chain of causation. So *per* Grove J.: "It does not by any means follow that, though the act of allowing the water to flow over the street in the first instance was wrongful, the defendant is liable for a stoppage occurring after the water had got back into its proper and accustomed channel."[44] All judges agree that once the water had returned to its proper channel, the wrongful conduct of the defendant is at an end, and no further damage, on the facts of this case, can be said to have been caused directly by the breach of the police regulation.[45] The court holds the damage to have been caused by the stoppage of a drain, and proceeds to decide the case on the principles of negligence.[46] The decision, therefore, does not in any way conflict with that in *Smith* v. *L. & S. W. Ry.* since the court holds first that the damage was not the direct consequence of the original unlawful act, and secondly, that the defendant was not negligent with regard to the object actually causing the damage.

Another case which caused much difficulty to Pollock in his treatise on the law of torts is that of *Cox* v. *Burbidge*,[47] a case of cattle trespass. It may here be noted in passing, that both this case and that of *Sharp* v. *Powell* are not cases brought in negligence, and the fact that learned writers find difficulty in reconciling them with the *Polemis* rule impliedly supports the present contention that the same principles of remoteness apply to all torts. In this case the offending animal, while trespassing on

[42] *Filliter* v. *Phippard* (1847) 11 Q.B. 347; *Musgrove* v. *Pandelis* [1919] 2 K.B. 43 at p. 47, *per* Bankes L.J. at p. 51, *per* Duke L.J.
[43] (1872) L.R. 7 C.P. 253.
[44] *Ibid.*, p. 260.
[45] *Ibid.*, p. 256, *per* Bovill C.J., p. 260, *per* Keating J.
[46] *Ibid.*, p. 259, *per* Grove J.
[47] (1863) 13 C.B.(N.S.) 430.

the road, kicked a child. As the court expressly negatives the presence of scienter, there is no point in further discussion of that heading of liability. It has been argued, however, that the child should recover since the injury to him was the direct consequence of the trespass, but the simple answer is that the child cannot satisfy the primary requirement of a tort committed towards himself. The trespass of the horse is a tort committed against the land-owner, but, in the absence of scienter, the child has no cause of action. This point is clearly taken by Erle C.J.: "As between the owner of the horse and the owner of the soil of the highway or the herbage growing thereon, we may assume that the horse was trespassing; and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. . . . But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff." [48] The answer surely is, as in *Bourhill* v. *Young*, that the question of remoteness of damage is irrelevant until it has been established that a tort has been committed towards the plaintiff.

(b) The second criticism of the *Polemis* rule is a theoretical one. Professor Goodhart argues that an act can only be negligent as regards those specific consequences which can be foreseen, and thus it is impossible to talk of consequences flowing from a negligent act.[49] Thus, he argues that if a man can foresee consequence A as the result of his conduct, but not consequence B, then he is negligent as to consequence A but not as to consequence B.

This view has been much discussed and it is proposed to make only two comments on it. First, though it appeals to the reason, it seems to be based on very scant authority. It is difficult in a negligence case to make the defendant liable piecemeal, and there seems little authority for this subdivision into various categories of damage. The test for liability in a running down case is surely whether the driver could foresee general damage to the plaintiff, and not whether he could foresee damage to the plaintiff's leg as distinct from his arm. In the words of Atkin L.J. in *Hambrook* v. *Stokes*,[50] "The duty of the owner of a motor car in a highway is not a duty to refrain from inflicting a particular kind of injury upon those who are in the highway. If so he would be an insurer. It is a duty to use reasonable care to avoid injuring those using the highway."

Secondly, and this is a point which seems to have been by-passed, this criticism really relates to liability and not to remoteness of damage. The suggestion in the example quoted above, is that

[48] *Ibid.* at p. 435.
[49] See *Essays in Jurisprudence and the Common Law*, pp. 118, 129.
[50] [1925] 1 K.B. 141 at p. 156.

the man escapes liability for consequence B, not because it is too remote, but because, in causing that damage, he has broken no duty and committed no tort. To determine liability for negligence, one looks not so much at the act or omission as at the damage which ensues; if one act causes several foreseeable types of damage to the plaintiff the doer has committed several torts against him by that act. This test, it is submitted, is unworkable; but even if it is correct, it does not affect the present argument which concerns remoteness and not liability. On this hypothesis, in the tort of negligence, questions of remoteness can never arise.

It is submitted, therefore, that despite any criticism, the test of directness established in *Smith* v. *L. & S. W. Ry.*, and approved by the court in *Sneesby* v. *Lancashire and Yorkshire Ry.*[51] and in *H.M.S. London*,[52] is the correct one. Lord Sumner in *Weld-Blundell* v. *Stephens* [53] followed the rule with the celebrated dictum: "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, want of due care according to the circumstances. This, however, goes to culpability not to compensation." So well established is the principle that Bankes L.J. in *Re Polemis* [54] reveals that even junior counsel "admitted that it could not lie in the mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage."

The truth of the matter, in the present writers' submission, is that the *Polemis* test is the correct one, and that any test of remoteness depending upon foreseeability is unworkable. Four arguments may be put forward in support of this view:—

(a) The *Polemis* rule has a sound historical background, and, as has been shown above, there seem to be no decisions or dicta which substantially conflict with it.

(b) The foreseeability test will not explain the "egg-shell" skull cases concerning the tort of negligence itself. The authority of these cases is well established and no one disputes that a person who negligently (one must necessarily beg the question and postulate that the tort of negligence has been committed) causes injury to another must take his victim as he finds him.[55]

Difficulties are at once encountered in reconciling this principle with liability only for foreseeable consequences, and Professor Goodhart attempts to explain the difficulty away in the following way: "Foresight is a concept which differs totally from probability. I may have foresight that a thing may happen even though it is

[51] (1874) L.R. 9 Q.B. 263 at p. 268, *per* Quain J.
[52] [1914] P. 72 at p. 76, *per* Sir Samuel Evans.
[53] [1920] A.C. 956 at p. 984.
[54] [1921] 3 K.B. 560 at p. 571.
[55] See *Clippens Oil Co.* v. *Edinburgh Trustees* [1907] A.C. at p. 303, *per* Lord Collins; *Grant* v. *Australian Knitting Mills* [1936] A.C. at p. 92, *per* Lord Wright; *Bourhill* v. *Young* [1943] A.C. at p. 109, *per* Lord Wright.

exceedingly improbable. Thus, a man who throws a book out of a window has foresight that the book may strike someone, although in the ordinary connotation of the word, there is no probability of it, as the chances may be a thousand to one against." [56] With all deference to the learned writer, it may be asked at what odds against the possibility does the consequence become not foreseeable? Since rules are often best tested by extreme examples, it may be profitable to apply this proposition in a concrete case. If the driver of a car knocks down a shabbily-dressed pedestrian carrying a parcel in such circumstances that he could have foreseen damage resulting to the pedestrian and his property as the result of his act, there is no doubt that he would be found negligent. If the driver is to be held liable for the loss of the pedestrian's income and the damage to his parcel, what are the odds against this shabbily-dressed person having the highest income in the world, or of his parcel containing an invention of fabulous value? Yet there is no doubt on accepted principle that the driver would be liable for such loss, as would the person in the example of Scrutton L.J.,[57] who negligently injured the favourite for the Derby. Can such damage really be called "foreseeable"? There must always be a possibility, however slight, of any consequence following directly from an act if it does in fact occur; the courts would indeed have a difficult task in deciding which consequences were too improbable for foresight. Surely the only solution to this problem lies in a recognition of the fact that the "egg-shell" principle imposes liability for consequences which could not have been foreseen.

(c) If the "foreseeability" test of remoteness can only be applied with difficulty to the tort of negligence, it is well nigh impossible to apply it to torts of "absolute" or "strict" liability. It is interesting to note that textbooks dealing with this problem draw their illustrations, almost without exception, from cases on negligence. Similarly, in reported decisions on remoteness cases the courts seem to have relied almost exclusively on such examples. Yet nearly all textbooks agree that the rule as to remoteness, whatever it may be, is applicable to all torts, and, moreover, they deal with it under the heading of general principles of liability in tort.[58] It is inconceivable that the rule as to remoteness varies from tort to tort, and we may assume the true test must be capable of covering them all. But the foreseeability test would hardly cover the liability of the auctioneer in *Hollins* v.

[56] *Essays in Jurisprudence and the Common Law*, p. 126.
[57] *The Arpad* [1934] at pp. 201–2.
[58] *Halsbury*, Vol. X, p. 102, note (*p*); *Winfield*, 5th ed., p. 67; *Salmond*, p. 133; *Clerk and Lindsell*, 10th ed., p. 185.

Fowler,[59] the press reporter in *Hulton* v. *Jones*,[60] or the owner of the reservoir in *Rylands* v. *Fletcher*,[61] to quote only a few examples. As a person can be sued for libel, conversion, trespass, the acts of dangerous animals, or under the *Rylands* v. *Fletcher* principle, without being in the slightest degree negligent, it would be ludicrous to hold him liable only for those consequences of his tort which he could have foreseen. What damage to Artemus Jones, as a barrister, could the reporter have foreseen if he was unaware of his existence? In such cases as these the damages must surely be estimated on the footing of the actual loss to the injured party, guided by the limiting principle of directness of causation.

(d) The final argument in favour of the directness test is to be found in the general principle underlying liability in tort. Contractual liability, on the one hand, is self-imposed, and no party is going to agree impliedly to bear liability for damage which he cannot foresee. Liability in tort, however, is not self-imposed but imposed on the parties by established rules of law. In the words of Lord Sumner, "The object of a civil inquiry into cause and consequence is to give reparation for damage done."[62] Foresight may be very relevant in deciding whether the defendant has committed a tort, but if he has, and the damage to the injured party is the direct consequence of the tortious act,[63] why should the tortfeasor escape liability at the expense of the innocent plaintiff? While liability for direct consequences is limited by the rules of causation, and while the plaintiff has to prove that a tort has been committed not only towards him but also towards the specific interest for which he is claiming damage,[64] less injustice will be done by the application of the directness test than if the tortfeasor is to escape liability for consequences which are not foreseeable. In individual cases there will clearly be some difficulty in deciding whether a consequence is direct, or the offshoot of a *novus actus interveniens*. But the courts would have no less severe a problem in determining whether a consequence was "foreseeable" and the matter can, no doubt, be left to their common sense.

The present submission is that, although the decisions resulting from the application of the two divergent tests may usually be the same, it is grossly mistaken in principle to apply a test of remoteness to tort which is only suitable to questions of remoteness in

[59] (1875) L.R. 7 H.L. 757.
[60] [1910] A.C. 20.
[61] (1868) L.R. 3 H.L. 330.
[62] *Weld-Blundell* v. *Stephens* [1920] A.C. at p. 926.
[63] *e.g.*, if the ship is burnt as the result of the careless dropping of the plank in *Re Polemis*.
[64] So in *Bourhill* v. *Young* [1943] A.C. at p. 109, Lord Wright states that the *Polemis* principle must "be understood to be limited, however, to direct consequences to the particular interest of the plaintiff which is affected."

contract. It is interesting in this respect to note the further remarks of two judges in the very cases in which they assert the similarity of the two tests. Thus, *per* Bowen L.J. in *The Argentino*: "The question is not what would have been the damage that might have been anticipated in the case of other ordinary ships, but what was the direct and actual damage done in the case of the *Argentino*. We have not to consider . . . whether sea-going ships ordinarily have such engagement as the *Argentino* had at the time of the collision, but what was the direct and natural consequence of a collision to a ship which, in fact, enjoyed such prospects of employment." [65] Again, *per* Greer L.J. in *The Arpad*: "It has been frequently decided that if a shipowner is deprived for a short time of the use of his vessel, which he uses in his business for the purpose of earning profits, the court can take into account the actual engagements of his ship during the time he is so deprived of the use of it." [66] There can be little doubt that such loss flowing from a breach of contract would be irrecoverable in the absence of express knowledge on the part of the defendant.

The true test would seem to be that the defendant's liability in contract is limited to the damage he could foresee resulting from its breach, while in tort he is liable for the actual damage caused to the specific interest of the plaintiff towards which the tort has been committed. Any attempt to reconcile these tests, therefore, is doomed to failure, since their fundamental objects differ so widely. In contract the courts are merely implementing an obligation created by the parties themselves, while in tort they are applying objective rules of law with the purpose of providing reparation for damage done. It is to be hoped that when the House of Lords at length speaks on the subject, this fundamental distinction will at last be recognised and the question decided beyond dispute.

J. F. Wilson.[67]
C. J. Slade.[67]

[65] (1888) 13 P. at p. 203.
[66] [1934] P. at p. 217. The views expressed by Bowen and Greer L.JJ. are applied to recover loss for actual charterparties, etc., in *The Northumbria* (1869) L.R. 3 A. & E. 6, *The Kate* [1899] P. 165 and *The Racine* [1906] P. 273.
[67] Mr. Wilson is a lecturer in Law at the University College of Wales, Aberystwyth, and Mr. Slade is a practising barrister.

THE JUVENILE LAW-BREAKER IN THE U.S.S.R.

The treatment of the young offender in the U.S.S.R is marked by two main trends at the present day: a return to greater personal responsibility and family discipline, and an emphasis on harnessing all its nationals to the productive machine. The whirligig of time has had its revenges, and the zealous revolutionary experiments of the twenties and early thirties have given way to the teaching of experience. The fact that huge masses of children were vagrant and uncontrolled as a result of war and famine represented the problem of the delinquent as one of circumstances, rather than character. As times have become more normal the bitter realities of the situation have reasserted themselves. As late as 1932 it was possible for Professor V. S. Utyevski to point out that the bourgeois world still clung to the necessity for punishing young criminals, whereas Russia, since 1918, had substituted purely educative sanctions.[1] The trial of juveniles by courts was branded as reactionary, though the juvenile courts of many western countries were grudgingly admitted to be better than the "ordinary courts." In his conclusions the writer stated that "Juvenile crime is a concomitant of capitalism. In a socialist society there will be no place for juvenile crime."[2] When it is added that young people today are commonly tried in the "ordinary courts" for many crimes, from the age of 12, in the U.S.S.R., it will be appreciated that a change, much like that which characterises the Soviet law of marriage,[3] has taken place, and that juvenile crime is still a problem facing the socialist society of today. The "hard core" of incorrigibles which tries the patience of every society exists in Russia. For them only the severest measures provide a palliative. In applying these measures the Soviet jurist is troubled by qualms. If they are imprisoned, is this a relapse to the imprisonment of children of which he accuses the capitalist world? The solution appears to be that typical of Soviet thought: a prison ceases to be a prison if it is called an educative establishment. Certainly, the motives of the State power may no longer be punitive, but how far is this material to the concrete service of sentence? The needs of reconstruction also call for manpower. There seems little doubt that the young offender is here being put to good use. Healthy

[1] *Juvenile Delinquents*, in the series *Child Welfare*, Moscow (1932), p. 8.
[2] *Ibid*, p. 20.
[3] See Dr. R. Schlesinger's book: *Changing Attitudes in Soviet Russia—the Family*.

productive labour, if it be such, does seem preferable to the alternatives often adopted. How this system works in practice is difficult to decide. Testimony on either side is likely to be highly coloured. Neither the political party nor the vicious criminal is likely to be a good first-hand source of information.

A little historical retrospect is necessary in order to appreciate the measure of the change in the attitude of the Soviet State towards its troublesome young. Here Professor Utyevski's work is very detailed [4] and may be checked and supplemented by a work of Professor M. M. Isayev.[5]

A decree of January 14, 1918, set up special Juvenile Commissions to deal with children under 16. Their avowed object was to protect the child and re-educate him, in order to turn him into a good citizen, ready to play his part in the work of the community. The composition of these commissions was interesting and may be noted, though already well known outside the U.S.S.R. The head of the commission was a representative of the local education authority, there was a medical officer, a juvenile investigator, a trade union official, a children's "friend," and, last but not least, the people's judge of the district. The cases were tried in camera and no reports appeared in the Press. The solutions were those dictated by medical, psychiatrical and educational theory, rather than the rules of law. Children under 14 were never punished. Those between 14 and 16 could be sent to corrective homes, or could be remitted for trial to the ordinary courts if the sanctions available to the commission were inadequate to deal with them. Children could be admonished, returned to parents, boarded out and dealt with in the usual ways common to this type of jurisdiction. Children over 16 fell under the jurisdiction of the ordinary courts but were sent to special places of confinement, away from adult offenders. These workhouses fell under the Ministry of Justice, not Education, and this led to some doubts as to whether they were not, in fact, prisons.[6] Professor Isayev draws a distinction between children of 14 to 16 who acted "with knowledge." An act done deliberately and counting the consequences exposed such minors to trial in the courts.[7]

During the twenties the details of the system changed and the age-limits varied. Educational reformatories tried to cure the offender by political indoctrination and teaching useful trades. In 1922 moral inculcation and wider intellectual horizons were the ideals advocated. Provision was made for special treatment of juveniles in the Code of Corrective Labour of 1924. A significant feature was the experiment conducted by the O.G.P.U. in training the most intractable offenders for productive work in mines and

[4] *Juvenile Delinquents* (*supra*).
[5] *Criminal Law: General Part*, Moscow (1948), pp. 326–333.
[6] *Juvenile Delinquents* (*supra*), p. 11.
[7] *Guiding Principles of Criminal Law*, 1919, cited Isayev (*supra*).

factories.[8] Instead of learning small handicrafts these men were taught for heavy industry. They lived in "prisons without bars" under what is said to have an autonomous system, complete with "trusties" and kangaroo courts. When sufficiently trained they were "leased" to nearby factories, with which their communes were affiliated. When they had completed training and otherwise satisfied the rules they were released and took their place at the benches with their fellows. In 1931 4,000 youths were farmed out and 400 were released. These figures are not astronomical but the pattern is interesting. In 1926 the Criminal Code provided that minors between 14 and 16 might receive only half the usual sentence.[9] In 1929 it was ruled that cases involving children between 14 and 16 should no longer be tried by the courts in any circumstances.[10] But a change-about was imminent.

On April 7, 1935, full criminal liability was reintroduced for children over the age of 12 years for robbery, theft, homicide, attempted homicide, wounding and aggravated assaults.[11] This was supplemented by further provisions in 1940.[12] An authentic interpretation of this legislation followed.[13] This explained that liability was the same for negligent as intentional crimes. A "ruling directive" mitigated the severity of the law to some extent by providing that this legislation should not be extended by analogy.[14] For all offences not specified in the above list the age of criminal liability was fixed at 14 years.[15] A problem has evidently arisen where a child is retarded in mental development. Professor Isayev[16] states that such children may be treated as incapable on mental grounds, but the text of the law on this subject seems concerned only with insanity in a very strong form.[17]

On May 31, 1935, the much vaunted functional Juvenile Commissions were abolished. The medico-educational system of correction thereby suffered a blow. It may be only fair to suggest that juvenile crime in 1935 was different from that of the immediate post-revolutionary times, that it is less common and is the work of more hardened wrongdoers. At any rate there has been a strong reaction towards despised bourgeois practices. Youths must, it is now said, be deterred from crime, and must acquire a personal sense of responsibility. Some mitigation of trial by the "ordinary

[8] *Juvenile Delinquents* (*supra*), p. 17, Pogryebinsky (1929), "A Factory of Men" there cited.
[9] R.S.F.S.R. Criminal Code, Article 50.
[10] Ruling of the Central Executive Committee and Council of People's Commissars of R.S.F.S.R., October 30, 1929.
[11] Decree of same.
[12] Decree of Supreme Soviet of U.S.S.R., December 10, 1940.
[13] Ruling of the Presidium of the Supreme Soviet, July 7, 1941.
[14] Directive of Supreme Court of the U.S.S.R., July 21, 1935. This refers to the extension of sanctions to offences not referred to in any statute but involving similar considerations.
[15] Decree of Presidium of the Supreme Soviet of the U.S.S.R., May 31, 1941.
[16] *Criminal Law: General Part* (*supra*).
[17] Criminal Code of the R.S.F.S.R., Article 11.

courts" is provided in large centres of population where the incidence of juvenile crime is large enough to justify specialisation. A decree now provides that special divisions of the people's courts try juvenile offenders, and that specially trained people's judges preside.[18]

Juvenile Procedure is outlined in an Appendix to the Code of Criminal Procedure of the R.S.F.S.R. Within a week of the commission of a crime the juvenile ought to be summoned, with his parent or guardian, and a representative of the school, to a preliminary hearing. The consent of the procurator is required before a case is set down for trial (which must be within 10 days).[19] The two lay assessors, who sit with a people's judge in all cases, must be drawn from school teachers on the panel of assessors. Children's cases must always be tried on a different day from adults. A representative of the office of procurator must attend the trial and be vigilant to detect irregularities. No child may be tried without a defence advocate. The child must be told of this right and the judge must insist on such an advocate being retained, and must assist him in preparing his case. Appeals by children from conviction are tried with special despatch. If the procurator is dissatisfied with a decision he may "protest" it, even if no notice of appeal is given by the child.[20] Appellate courts must form special divisions for the trial of juvenile appeals.[21] In any case the judge must invariably submit his decision to the appellate court for scrutiny and confirmation. Any adult contributing to the delinquency must be named in the judgment, and any inadequacies in the work of the school must be pointed out. It is emphasised that a correct atmosphere must be maintained in court and the special nature of this jurisdiction remembered.

Juveniles of at least 16 years of age are liable to the full rigours of the law for embezzlement and other crimes showing calculation, for violent and vicious crimes, and other very serious offences. After conviction they may be imprisoned but must be detained in separate juvenile prisons. They may not be kept more than a month in reception or transfer centres. First offenders must not come in contact with "young lags."[22] Minors between 14 and 16 are liable in bad cases to sentences of forced labour. In other cases they, like children under 14, receive less severe punishment. This often takes the form of being sent to a special institution managed by the Ministries of Education and Health. A child may

[18] Decree of People's Commissariat of Justice of the U.S.S.R., June 19, 1943.
[19] Directive of the Supreme Court of the U.S.S.R., July 21, 1935.
[20] This is done by reporting to higher procuratorial channels, who bring the matter before a higher court. The institution of procurator or State's attorney is familiar in most European systems but has no precise equivalent in this country.
[21] Directive of the Supreme Court of the U.S.S.R., July 21, 1935.
[22] This refers to habitual criminals, "recidivists" or relapse cases, in Continental usage.

also be sent to an institution where, to use our phrase, it is "in need of care or protection." [23] Censure, submission to parental control, are among other measures. If a child is a persistent offender or escapes from a children's institution it may be given a long term of imprisonment.

The old O.G.P.U. system exists in a different form. Where a court dismisses a charge of petty crime against a child under 16 it may send the child to a correctional colony.[24] It will be noted that the O.G.P.U. communes were designed to deal with the worst incorrigibles. Labour is now regarded as preferable to confinement, it seems, and reserved for the least criminal types. Children may be released at any age up to 16 but will not be released under the age of 14 unless they have parents, guardians or relatives ready to take charge of them. These new colonies are operated by the M.V.D., successor in title of the N.K.V.D. and the O.G.P.U. They also take in children between the ages of 11 and 16 who are found homeless or vagrant, and children who have proved unmanageable in children's institutions.[25]

Parents are personally liable for encouraging their children to commit crime, and may be punished with *at least* five years' imprisonment.[26] In every juvenile trial the court watches for evidence of instigation, and orders a prosecution of the parents.[27] The police ("militia") are authorised to impose fines on parents, in the sum of up to 200 roubles, for hooliganism and street pranks of their children.[28] It is the duty of the court at the trial to ascertain whether this has been done. If parents are in any way to blame for a child's delinquency they may be made to pay, or contribute towards, the cost of its maintenance in a children's institution.

Although the law of juvenile tortfeasors in the U.S.S.R. is less specifically Russian than the law of juvenile crime, it is now a conscious part of the same campaign against juvenile disorder and ought not to be omitted. The system is obviously based on the French Civil Code, but the Soviets now insist that their rules are essentially quite different from the rules of Western Europe, though the texts hardly bear out this claim. A brief reference to French and German law may be useful. The French Civil Code [29] makes parents vicariously liable for civil damage caused by children for whom they are generally responsible. In 1922 and 1937 amending

[23] Decree of Council of People's Commissars of the U.S.S.R., May 31, 1935, Articles 11, 22.
[24] Orders of the People's Commissariat of Justice of the U.S.S.R., June 19, 1943; June 15, 1943.
[25] There are no specific provisions altering the mode of employment of these minors. Presumably they are still used in industry.
[26] Law of April 7, 1935.
[27] Juvenile Procedure Supplement to R.S.F.S.R. Criminal Procedure Code (1947) Part 2 (6).
[28] Decree of May 31, 1935, Article 18.
[29] Article 1384, text in Lawson, *Negligence in the Civil Law*, 186.

legislation was passed [30] which makes either parent (father or widowed mother) liable for minor children living at home, but allows proof that the parent could not prevent the act which caused the damage. This interesting point of causation is very relevant to the discussions among the Soviet jurists. The German Civil Code [31] provides that where any person is bound by law to supervise a minor he is also bound to make compensation for any damage which such minor unlawfully inflicts on a third party.

A child under 14 is not civilly responsible in the U.S.S.R. If a child is over 14 but under 18 he is equally liable with his parents.[32]

If a child is under 14 his parents are liable for his torts unless formally relieved of the duty of supervision. The influence of the French Civil Code is clear. An amendment to the Soviet Civil Code makes the parents equally liable for the torts of children between 14 and 18.[33] Paradoxically, this amendment makes no reference to any duty of supervision. The courts interpret this enactment literally and have placed full liability on parents, even though the child is no longer under their care.[34] Since children of such ages may earn a little money it would seem that the liability of the parents ought to be reduced, not increased. Parents and child are usually joined as defendants. If the plaintiff elects to sue the parents alone the court must join the child as primary defendant. If the child is sued alone it is the practice for the court to join the parents, on its own initiative. This is laid down in a "ruling directive," [35] and can now only be altered by legislation, but is criticised as inconsistent with the nature of the parents' liability.[36] Judgment is usually given against parents and children jointly for the full amount, in case neither can pay in full. It has been suggested that the liability of the parents ought to be secondary, that of sureties only.[37] In most cases the child will have no assets or earnings, so the question seems academic. There is some ground for the view that if a child obtains paid work while an instalment order is still undischarged, this might be made primarily liable to satisfy it. If several children join in the commission of a tort, the various groups of parents are said to be proportionately liable. This is probably an academic solution and may not represent the practice of the courts. Both father and mother are normally equally liable for the torts of their child. The earnings of each are liable to be garnisheed. If the courts have awarded sole custody of a child to

[30] Loi de novembre 7, 1922; loi d'avril 5, 1937, Lawson, *supra*.
[31] Article 832, Lawson, *supra*, 206.
[32] Articles 9, 405, as amended in 1935.
[33] *Ibid.*
[34] Professor Tadyevosyan, *Soviet State and Law* (1949) No. 4. Discussion on Torts of Children.
[35] Directive of Full Bench of the Supreme Court of the U.S.S.R., June 10, 1943.
[36] Tadyevosyan (*supra*).
[37] On the ground that there is no actual joint tort.

one parent, the other parent will not be liable for future torts of the child, so far as they are based on the duty of supervision. If one of two parents is liable, the earnings of that parent and his or her share of the joint estate are liable to be taken in satisfaction of the judgment.

There is considerable theoretical divergence as to the nature of the parents' liability for children under 14. One view is that there is only a presumption of actual liability, based on failure to exercise adequate supervision, even if the child is living at home, and that the parent can rebut this presumption by proving he could not prevent the commission of the tort.[38]

Others say that any tort committed by a child living at home is vicariously attributed to the parents. They must, at their peril, so train and discipline their child that he observes the law. It is immaterial, in this view, that the parents could not have prevented the commission of the particular tort in question.[39] This latter view is based on the aim of the law: the prevention of parental neglect and juvenile vagrancy. The practical consequences of this debate appear to be small. Those lawyers who insist that liability depends on fault are usually satisfied with constructive fault, *e.g.*, allowing the children to keep bad company.[40]

The law, again, does not make it clear what, if at all, is the effect of de facto absence of supervision. If a child lives in a different town from his parents, but is not in a public institution or in charge of a local authority, the parents seem to remain liable for his torts, and unable to " delegate " the duty of supervision so as to escape responsibility. Illness, absence at work, are no excuse for the parent. This is all quite a different world from the free-and-easy ideas of the revolutionists.

Where the child is over 14 the silence of the legislation on the matter of supervision eliminates the problem, but leaves a curious anomaly. No doubt this question will be taken into account when the long-awaited new Civil Code is drafted. In the meantime there are signs that on this subject political thought in the U.S.S.R. has turned about in the direction of family discipline and these particular rules about children's torts, the heritage of the New Economic Policy, and of obviously bourgeois origin, may fit quite well into the present Soviet system, and that revolutionary codes, on this subject at least, have waited too long and would now come too late.

Albert Kiralfy.[41]

[38] Bratus, *Civil Law Textbook* (1947), 367; A. V. Karass, *Soviet State and Law* (1949), No. 5, pp. 70–71.

[39] K. Yaichkov, G. M. Sverdlov, V. I. Syerebrovsky, *Soviet State and Law* (1949), *ibid.*

[40] " Culpa in eligendo," an element in vicarious liability on the Continent. The practical consequences may be much the same as under the system of strict liability.

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A NOTE ON THE REVIVIFICATION OF A DISSOLVED FOREIGN CORPORATION

APART from the Companies Act, the dissolution of a corporation by the law of the country of incorporation, without any provision being made for the payment of creditors, is unreservedly accepted by the English courts [1] and this even where there are assets [1] or a branch office [2] (or agency) in this country. Some results of this recognition must be briefly enumerated : the corporation can neither sue,[3] nor be sued [4]; it is possible that debts due to and from it are abrogated by the dissolution [5]; and in any event all its property in England will vest in the Crown as *bona vacantia*.[6] But in many cases these consequences will prove more theoretical than actual, for a situation of this kind is usually produced by a revolutionary disturbance, and in such circumstances the branch in England will often remain in ignorance of the true state of affairs for some time after the dissolution. Thus, as the cases show, considerable uncertainty existed after the 1917 Russian revolution, and the London branch of the Russian and English Bank continued its operations until June, 1920, whereas the corporation had ceased to exist at the latest by January 26, 1918. Moreover, even if the dissolution is notorious, it may be, so far as English law is concerned, a mere nullity as being the act of a non-recognised body; subsequent recognition of that body as a *de facto* government operates as a retroactive validation [7] of the dissolution (if it was in fact the act of the new government or has been adopted by them), with disastrous consequences on acts performed by the corporation in the interim. The position of an English branch which continues to function in these conditions is aptly put by Atkin L.J. [8]:

[1] *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289, esp. *per* Lord Wright at p. 297.

[2] *e.g.*, *Russian and English Bank* v. *Baring Bros.* [1932] 1 Ch. 435. (Compliance with the provisions as to oversea companies contained in the Companies Act makes no difference. If the branch is incorporated under the English Companies Act, obviously the dissolution will in no way affect it.)

[3] S.C.

[4] *Deutsche Banque* v. *Banque des Marchands de Moscou* (1932) 158 L.T. 364.

[5] Lord Atkin—*Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405, at p. 427; but *cf.* Lawrence L.J. in *Re Wells* [1933] Ch. 29, at p. 51–2.

[6] *Cf. Re Higginson and Dean* [1899] 1 Q.B. 325; *Re Wells* (*supra*); *Lazard Bros.* v. *Banque Industrielle de Moscou* [1932] 1 K.B. 617, *per* Scrutton L.J. at p. 641; *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405, *per* Lord Maugham at p. 444. Chalmers and Hood Phillips, *Constitutional Law* (6th ed.), p. 168; *Palmer's Company Precedents* (16th ed.), pt. 2, p. 660.

[7] *Luther* v. *Sagor* [1921] 3 K.B. 532; *White, Child, and Beney, Ltd.* v. *Eagle Star and British Dominions Insurance Co., Ltd.* (1922) 38 T.L.R. 616; Oppenheim, *International Law* (6th ed.), Vol. I, p. 144.

[8] *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1923] 2 K.B. 630 at p. 663.

> "The result of holding that it was, in fact, dissolved in January, 1918, is to make it impossible to enforce any of its rights or liabilities, and to leave in considerable peril all those who in the course of banking business in the City of London have in any way, at any time after 1917, taken any part in disposing of or handling its assets; for obviously a non-existent person can give no title to anything."

Many of the difficulties resulting from the dissolution may be avoided by obtaining a winding-up order under section 399 (5) (*a*) or section 400 of the Companies Act, 1948 [9]; it seems jurisdiction may be founded on the mere presence of assets in this country.[10] From this rather illogical power to wind up a dissolved corporation four interesting points emerge:

(i) Despite the possibility of the abrogation of his debt, a creditor may petition *qua creditor* for a winding-up order.[11]

(ii) As a non-existent entity cannot be wound up, and as the provisions of the Companies Act have no meaning on any other basis, the corporation must be wound up as if it were a corporation which had not been dissolved.[12]

(iii) The property of the corporation which on dissolution, theoretically at least, vested in the Crown, must be deemed to have revested in the corporation,[13] it being a distinctive feature of an English winding-up that the property is vested in the company and not in the liquidator.[14]

(iv) The cases clearly show that pre-dissolution assets may be wound up, pre-dissolution debtors sued, and pre-dissolution creditors paid.[15]

From these propositions it is obvious that once a winding-up order is made the dissolution becomes to a certain extent irrelevant, and that the corporation is correspondingly revivified. It is the extent of this revivification which is of importance. Does it in any way affect the invalidity of acts performed in the period between the winding up and the dissolution?

On grounds of convenience alone it would be desirable if some mitigation could be found for the severity of the common law. For those who acquire property from the corporation during the interim period acquire no title thereto, and if the winding-up has no effect on this, then it is presumably incumbent [16] on the unfortunate

[9] 11 & 12 Geo. 6, c. 38. Formerly ss. 338 (1) (*d*) (i) and 338 (2) of the Act of 1929.

[10] *Banque des Marchands de Moscou* v. *Kindersley* [1951] Ch. 112; see 11 (1952) Camb. L.J. 198.

[11] This was a matter of assumption in *Re Russian and English Bank* [1932] 1 Ch. 663; *Re Russian Bank for Foreign Trade* [1933] Ch. 745; but was expressly mentioned by Lord Atkin, *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405 at p. 429.

[12] *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405.

[13] S.C. *per* Lord Atkin at p. 426–7.

[14] *Cf. e.g., Re Webb & Co.* [1922] 2 Ch. 369, at p. 388.

[15] See the cases mentioned in n. 11, *supra*.

[16] By virtue of s. 243 (1) of the Companies Act, 1948.

liquidator to recover such property, which, in the case of, *e.g.*, a bank, would be a virtually impossible task. Moreover, the agents of the corporation would find themselves liable to an action for breach of warranty of authority [17] at the suit of those who find themselves prejudiced by the liquidator's activities. But recently Vaisey J. rejected the argument that the revivification validates acts performed during what he termed the "*interregnum*"; and in *Re Banque des Marchands de Moscou, Wilenkin* v. *The Liquidator*,[18] he dismissed the claim of a legal expert, who had rendered admittedly valuable services to the bank in this country between the date of the dissolution and the making of the winding-up order, to participate in the liquidation. An examination of the authorities (which he did not mention nominatively) failed to convince the learned judge that there was (in the eyes of the law!) anyone to whom the services could have been rendered. He then said [19]:

> "The only ground on which this claim could be allowed would be that I must decide as a matter of law that the bank was, for the purpose of Mr. Wilenkin's activity, in existence, and was employing him in and about its business and actions. These metaphysical conceptions seem to me to be extremely difficult, and when there is a hypothesis on a hypothesis such as one has when it is said that the non-existent bank was none the less deemed to be employing a non-appointed agent to conduct its non-existent affairs, one gets into a maze of metaphysics . . . from which there is really, I think, no logical escape."

However, it is suggested with the greatest respect that there is some authority in the cases [20] to justify taking the other and more realistic course, *i.e.*, that once the winding-up order has been made the company ceases to be, or have been, non-existent. In *Russian and English Bank* v. *Baring Bros.*[21] three members of the House of Lords held that, as a matter of necessary implication, the dissolved corporation must be wound up "as if it were a company which had not been dissolved" [22]; the question was asked,[23] but, unfortunately, not expressly answered, as to the extent of this revivification. It is suggested that within the English jurisdiction it is complete. Bearing in mind the normal rule that a company's liabilities are ascertained as they exist at the time of the

[17] *Cf. Yonge* v. *Toynbee* [1910] 1 K.B. 215, esp. at pp. 227, 232.
[18] [1952] 1 T.L.R. 739; [1952] W.N. 151; [1952] 1 All E.R. 1269.
[19] [1952] 1 T.L.R., at pp. 747–8.
[20] Non-judicial authority is barren on this point. See generally: *Palmer's Company Law* (19th ed.), pp. 449–50; Professor B. A. Wortley, 14 B.Y.B.I.L. 1, and 48 L.Q.R. 321; Dicey, *Conflict of Laws* (6th ed.), p. 476; Lloyd, *Unincorporated Associations* (1938), pp. 196–7; Cheshire, *Private International Law* (3rd ed), pp. 632–6; Wolff, *Private International Law* (2nd ed.), p. 305; *Buckley on the Companies Acts* (12th ed), annotations to ss. 399 (5) (*a*) and 400; Halsbury, *Laws of England* (1949 ed.), vol. 5, pp. 942–3.
[21] [1936] A.C. 405.
[22] *Per* Lord Blanesburgh, at p. 421.
[23] By Lord Russell, at p. 433.

winding-up order,[24] what are the liabilities of a corporation wound up under section 399 (5) (*a*) or section 400? Apart from the dissolution which should be treated as irrelevant on the making of the order, no distinction can be drawn between pre- and and post-dissolution transactions: this was clearly the view of Lord Atkin [25]:

> "Nor is it any easier to confine the distribution to assets existing at the date of the dissolution among creditors in existence at the same date. The latter proposal, indeed, seems to accentuate difficulties in the case of a bank trading after dissolution and daily changing its assets and liabilities."

Earlier in his judgment he referred to "creditors of the . . . post-dissolution period." [26] It should also be noted, as Evershed M.R. remarked in *Banque des Marchands de Moscou* v. *Kindersley*,[27] that the construction placed on what is now section 400 of the Companies Act, 1948, by Bennett J.,[28] *i.e.*, that it had no application to a corporation dissolved before the commencement of the Act, "involves the notion that a foreign corporation which has been 'dissolved or otherwise ceased to exist as a company' may still be regarded as carrying on business in this country." That there is no inherent impossibility in such concepts is shown by *Tymans, Ltd.* v. *Craven*,[29] where the Court of Appeal held that the reinstatement under section 353 (6) of the Companies Act of a company which had been dissolved on removal from the register under section 353 (5), operated as a complete validation of all acts purported to have been done on behalf of the company during the time when it was non-existent. Though this was a decision on a more explicitly drafted section of the Act,[30] the present submission is that there is no obstacle to a similar effect being attributed to section 399 (5) (*a*) and section 400—they clearly presuppose a revivification, but give no indication of its extent. Surely this limitation should be dictated by what is reasonably necessary for allowing effect to be given to that which is the obvious import of the section—*i.e.*, the satisfactory winding-up of a dissolved company—to hold that the revivification is only partial would serve merely to increase the difficulties of liquidation, often to an almost insuperable extent.

[24] *Re General Rolling Stock Co.* (1872) 20 W.R. 762.

[25] [1936] A.C., at p. 429. Lord Blanesburgh at p. 422 expressed his approval of the grounds on which Lord Atkin based his decision. Paradoxically both of their Lordships mentioned that the revivification was for "particular and limited purposes" (at pp. 417 and 428). If the passage quoted has any validity the "limited purposes" must be very wide.

[26] At p. 423.

[27] [1951] Ch. 112, at p. 129.

[28] *Re Russian and English Bank* [1932] 1 Ch. 663 (s. 338 (2) of the Companies Act, 1929).

[29] [1952] 2 Q.B. 100 (*cf. Morris* v. *Harris* [1927] A.C. 252).

[30] Lord Atkin [1936] A.C., at p. 429, expressed the wish that the legislature had worked out the difficulties consequent on the application of ss. 399 (5) (*a*) and 400.

Were Lord Atkin's view to be adopted there does not seem any cause for differentiating between acts performed by the London agency before and after notice or constructive notice of the dissolution—in view of the possible consequences the wisest course for all concerned would be to apply for a winding-up order as soon as the dissolution is known of or becomes valid. If the agents attempted to take advantage of the situation to engage in self-aggrandisement, there seems to be no reason, once a winding-up order is obtained, why they should not be liable to the sanctions imposed by sections 332 and 333; for section 399 (1) enacts that " all the provisions of this Act with respect to winding-up shall apply," and the two former sections fall within the general heading of " Provisions Applicable to Every Mode of Winding-Up."

The only authority which appears at first sight to be in opposition to a complete revivification is *Re Russo-Asiatic Bank*,[31] where Eve J. held that the Limitation Acts did not run in favour of a dissolved corporation between the date of the dissolution and the date of the winding-up order: the ground of the decision being that during that period, as there was no one who could have been joined as a defendant, there was no cause of action. But this represents no more than a very necessary bridge between the common law and the Companies Act, for to hold to the contrary, total revivification on winding-up or not, would completely negative the purpose of the winding-up in cases like *Re Tovarishestvo, etc., Rabenek*,[32] where the petition was presented 24 years after the dissolution in Russia.

Juristically, no doubt, the proposed solution is inelegant, but no more so than the revival produced by section 353 (6), indeed, logic was, fortunately, abandoned when it was enacted that a dissolved company could be wound up, and as Lord Macmillan said [33]:

> " I do not think that it is either necessary or profitable to discuss problems as to the precise legal status of a dissolved company which has been ordered to be wound up. In this connection metaphors may easily be misleading and serve only to create their own puzzles."

In refusing to validate acts performed by or on behalf of the corporation before the date of the winding-up order, Vaisey J. refused to entertain any " metaphysical conceptions," but it is suggested with all due deference that his judgment is based on a strict theory of corporate personality which is out of place when dealing with a problem of this nature.

M. Mann.[34]

[31] [1934] Ch. 720; *cf.* Preston and Newson, *Limitation of Actions* (2nd ed.), p. 3–4. It is suggested that *Russian and English Bank* v. *Baring Bros.* [1934] 1 Ch. 277, where the *ratio decidendi* adopted by Bennett J. was that there was nothing in s. 399 (5) (*a*) in any way to reanimate the plaintiff bank, should be reconsidered in view of the later House of Lords decision.

[32] [1944] Ch. 404.

[33] [1936] A.C., at p. 439.

[34] Mr. Michael Mann, LL.B.(Lond.), holds a Tutorial Studentship at King's College, London, where he is engaged in research for a higher degree.

NOTES OF CASES

Evidence of "Similar Acts"

Two recent decisions, *R.* v. *Hall* [1952] 1 All E.R. 66, a decision of the Court of Criminal Appeal, and *Harris* v. *D. P. P.* [1952] 1 All E.R. 1044, a decision of the House of Lords, make it opportune to review what is perhaps the most difficult task which can face a presiding judge at a criminal trial, namely, the admission or rejection of evidence of "similar acts" by an accused person.

Two general principles have for long been unquestioned. (1) It is not competent for the prosecution to adduce evidence of "similar acts" by the accused merely to lead to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. (2) The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, *e.g.*, whether the acts alleged to constitute the crime were designed or accidental, or to rebut a defence which would otherwise be open to the accused (*Makin* v. *Att.-Gen. for New South Wales* [1894] A.C. 65).

The difficulty of applying these principles with confidence was illustrated and increased by the decision of the Court of Criminal Appeal in *R.* v. *Sims* [1946] K.B. 531.

In *R.* v. *Sims* Lord Goddard, delivering the judgment of a court of five judges, laid it down (a) that evidence is admissible if legally relevant to the issue whether the accused has committed the act charged; (b) that evidence is not to be excluded merely because it tends to show the accused to be of bad disposition, but only if it shows nothing more, and (c) that evidence of specific acts or circumstances connecting the accused with specific features of the crime charged is admissible even though it tends to show him to be of bad disposition. The court rejected the often expressed view that the admissibility of evidence of "similar acts" depends on the nature of the defence raised by the accused, or that all evidence tending to show a disposition towards a particular crime must be excluded unless justified. In the particular case the court held that evidence of previous similar acts of sexual perversion was admissible to show the nature of the act done by the accused. The court took the view that the accused should not by confining himself at the trial to one particular issue be able to exclude evidence that would be admissible and fatal if he ran two defences.

The Judicial Committee of the Privy Council in *Noor Mohammed* v. *R.* [1949] A.C. 182, refused to accept the view expressed in

R. v. *Sims* that the admissibility of evidence of similar acts could be determined without reference to the nature of the defence. They referred with approval to *Thompson* v. *R.* [1918] A.C. 236, where Lord Sumner said: " Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant." (In *Thompson's Case* evidence of " similar acts " was admitted to prove identity in a case of an abnormal sexual crime where a defence of an alibi was raised, and Lord Sumner conceded that it was paradoxical that a man whose act is so markedly wicked as to admit of no doubt about its character (and merely denies the act) may be better off in regard to admissibility of evidence than a man whose acts are, at any rate, capable of having a decent face put upon them (when evidence of " similar acts " might be admissible as proving intention), and that the accused can exclude evidence that would be admissible and fatal if he ran two defences by prudently confining himself to one.) The Privy Council in *Noor Mohammed's Case*, while disapproving of the principle laid down in *Sims' Case* and accepting the views expressed in *Thompson's Case*, added one important qualification to the rule laid down by Lord Sumner. They considered that evidence of " similar acts " could not be excluded merely because the accused set up no defence other than a general denial of the crime alleged. An accused person could not exclude evidence of " similar acts " merely by saying: " Let the prosecution prove its case, if it can." One may look not only at the defence raised but at the facts and circumstances of the particular offence charged. If those facts and circumstances are consistent with innocent intention then further evidence of " similar acts " may be adduced to show guilty intention.

In *Hall's Case* Lord Goddard accepted the criticism of the Privy Council of the decision in *Sims' Case* and agreed that evidence of " similar acts " must be excluded unless justified in the particular case. He emphasised, however, that no doubt had been thrown by the Privy Council on the view that evidence of " similar acts " was admissible to show that particular conduct was of a guilty and not an innocent nature. The court further held that the decision in *Thompson's Case* (where evidence of " similar acts " was admitted to show identity) was just as relevant where the defence was " I have never seen the complainant before in my life," as where the defence was, as in *Thompson's Case*, an alibi. Lord Goddard said: " The expression ' identity ' means that the evidence of the prosecution goes to show that the witness for the prosecution is speaking the truth when he says ' That is the man who did these indecent things to me '."

The decision in *Hall's Case* left the reader very doubtful when evidence of "similar acts" should properly be excluded. If evidence

of "similar acts" may (anyhow in the case of abnormal sexual crimes) be admitted to prove "identity"—in the wide sense laid down by Lord Goddard, and also to prove that acts of a possibly innocent nature were of a guilty nature, when may it be excluded?

The decision of the House of Lords in *Harris* v. *D. P. P.* provides the answer to this question. Viscount Simon explains the decision in *Sims' Case* as meaning no more than that the prosecution may advance proper evidence to prove its case without waiting to ascertain what is the line adopted by the defence. There is, however, another principle which safeguards the accused from the too easy introduction of evidence of previous conduct tending to his prejudice. In *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, the Court of Criminal Appeal laid it down, dealing with the allied topic of cross-examination on a prisoner's previous convictions that, even when such cross-examination has been rendered admissible in law by the nature or conduct of the defence, the presiding judge has a discretion to disallow it on the ground that it may be fraught with results which immeasurably outweigh the results of questions put on behalf of the prisoner. This principle emerged somewhat shaken from *Noor Mohammed's Case*, where the Privy Council remarked that "cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible." Evidence may be unduly prejudicial to the accused even though the ground for admitting it may not be "tenuous." The House of Lords has restated the principle in clear and helpful terms which leave a proper discretion to a presiding judge: "A criminal trial in this country is conducted for the purpose of deciding whether the prosecution has proved that the accused is guilty of the particular crime charged, and evidence of 'similar facts' should be excluded unless such evidence has a really material bearing on the issues to be decided." Again it is "the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of 'similar facts' affecting the accused, though admissible, should not be pressed because its probable effect 'would be out of proportion to its true evidential value.'"

G. Godfrey Phillips.

Insanity as a Defence in a Civil Action of Assault and Battery

"What degree of mental illness, if any, can constitute a defence to an action in tort, and in what circumstances?" In these terms

Stable J. succinctly posed the question he was asked to determine in *Morriss* v. *Marsden and Another*.[1]

The textbook writers will therefore no longer be able to recite accurately: "There is no reported instance of an action of tort ever having been brought in this country against a lunatic. . . ."[2]

The facts of *Morriss* v. *Marsden* raised the issue in an acute form. The defendant was a catatomic schizophrenic and a certifiable lunatic. In 1945 he had been detained as a private patient in a mental hospital but was released after a month because the reception order proved to be invalid.[3] His mother, on signing the authority of discharge, undertook to be responsible for his proper care and treatment. In 1949 the defendant was staying at a Brighton hotel when, without the slightest provocation, he attacked the manager with a "blunt instrument." He then fled and was subsequently apprehended by the police at Southampton. When tried on indictment on a charge of criminal assault, he was found unfit to plead and was directed to be detained during His Majesty's pleasure.

The hotel manager now brought this *civil* action against the defendant and his mother claiming (i) damages from the defendant for assault and battery, and (ii) damages from the mother for negligence and breach of duty. Stable J. awarded a total of over £5,800 damages on the first claim but held there was no evidence to support the second.

It is rather surprising that the tortious liability of a lunatic for his wrongful acts has never been authoritatively defined in English law. Modern text-writers adopt a uniform view, of which *Clerk and Lindsell* is characteristic, *viz.*[4]:

> "... it is apprehended that lunatics are liable for torts to the same extent as sane persons, provided that the torts are committed by them while in that condition of mind which is essential to liability in sane persons. In its absence, it would appear that there is no voluntary act at all. In cases where liability depends on some specific state of mind (*e.g.*, malicious prosecution, libel on a privileged occasion), lunacy may be strong evidence to show that the necessary element is lacking and may therefore be a good defence."

Thus it would appear that a lunatic might escape tortious

[1] [1952] 1 All E.R. 925. The facts of the case limited the arguments to the question of a lunatic's liability in trespass to the person. For admirable discussions of the wider question see, *inter alios*, Bohlen, *Studies in the Law of Torts* (1926) at pp. 543 *et seq.*; and W. G. H. Cook, "Mental Deficiency in Relation to Tort," 21 Col.L.R. 333 (1921).

[2] *Clerk and Lindsell on Torts*, 10th ed. (1947) at p. 86. *Halsbury's Laws of England*, 2nd ed. (Hailsham) Vol. 21, s. 498, cites the same passage from the 8th ed. But note that in *Cross* v. *Andrews*, Cro.Eliz. 622 (1598), an innkeeper's plea of insanity in defence to an action on the case by a guest, for failure to keep the guest's goods in safe custody, was rejected.

[3] On the ground that his brother who applied for it was under 21 years of age at the date of application.

[4] *Loc. cit.*, *supra*.

liability if (a) the condition of his mind rendered the act involuntary, or (b) he was mentally incapable of forming some specific intent required as an essential element of the tortious act in question.

If this analysis of the supposed legal position is kept in mind, it will be appreciated that *Morriss* v. *Marsden* does little to clarify this obscure corner of the law.

Stable J., in an unreserved judgment, came to the following conclusions of fact, *viz.*:

(i) That at the time of the assault the lunatic was neither in a condition of automatism or trance, but that *his mind directed the blows he struck*, and

(ii) He was a catatomic schizophrenic and a certifiable lunatic who (a) knew the nature and quality of his act, but (b) whose incapacity of reason arising from the disease of his mind was of so great a character that he did not know that what he was doing was wrong (at pp. 926–7).

Having made these determinations of fact, the judge directed his attention to three main points, *viz.*:

(i) Whether the *M'Naghten* rules determine civil, as well as criminal, responsibility.

Stable J. had no difficulty in rejecting the rules as "the only test" (*ibid.*, at p. 927) of civil responsibility. Clearly they were inapplicable as a test of contractual or testamentary capacity, and there was nothing in *White* v. *White* [1949] 2 All E.R. 339 (a divorce petition based on the alleged cruelty of an insane respondent) to suggest to the contrary. By limiting his rejection of the rules to a denial of their exclusiveness as a test of responsibility, the learned judge avoided the broader query as to whether the so-called rules have any relevance to civil law *at all*. It is suggested that they have none and that the application of the rules by the Court of Appeal in *White* v. *White* reflects the lingering concept in the judicial mind (a concept not shared by Denning L.J.[5]) that divorce proceedings have a criminal flavour.

(ii) Whether any specific intention is required to commit an assault, and if so, whether in this case the lunatic was capable of forming such a specific intention.

It is now generally considered correct to assert that proof of intention or negligence is essential in all actions of trespass. Much of the old learning about the strictness of liability in trespass has been recently shelved in the archives of archaic legal thought. Bohlen, for example, has admirably outlined the gradual grafting of a "negligence" element, *via* the concept of inevitable accident, onto the old fertile mother of actions.[6] The generally held view

[5] And see Pearce J. in *Lissack* v. *Lissack* [1950] 2 All E.R. 233 at 237.

[6] *Loc. cit.*, at p. 550. "Therefore, in trespass for harm directly done to the bodily condition of another, the liability ceased to be a liability imposed without fault and was imposed, as in trespass on the case for harm

is that the Court of Appeal affirmed this development in *National Coal Board* v. *Evans*.[7]

But in concluding that intention or negligence is an essential element in tortious liability for trespass, Stable J. states,

> " On the whole, I accept the view, that *an intention—i.e., a voluntary act*, the mind prompting and directing the act which is relied on as in this case, as the tortious act—*must be averred and proved* " (at p. 927).

With respect, it is submitted that there are two fallacies in this statement, *viz.*:

(a) The learned judge appears to have confused two different mental elements, *i.e.*, intention and volition, by defining one in terms of the other. If a man's mind " directs the blows he strikes " the act of striking is " intentional " but it is still possible for that same act to be " involuntary." In tort, as in crime, there is no invariable equation of volition and intention.[8] In other words volition is a necessary concomitant of every tortious act; intention is an ingredient of most but not all torts.

" Volition," *i.e.*, " a certain psychic awareness " (Paton, *Textbook of Jurisprudence*, 1946, at p. 234), is essential before there can be a juridical act at all. In actions of tort it is always open to the defendant to prove his act was involuntary, even in those cases of strict liability where " intention " is irrelevant. In *Weaver* v. *Ward* one of the illustrations given of trespasses utterly without fault was " . . . as if a man by force take my hand and strike you." [9] Likewise the examples given by Stable J. of acts done by an automaton or a somnambulist fall into the same category of involuntary acts.

" Intention," however, is a distinct thing which has acquired a technical meaning. It " signifies full advertence in the mind of the

indirectly done thereto, only if the defendant was at least guilty of 'negligence.'"

[7] [1951] 2 All E.R. 310; see 15 M.L.R. at pp. 79 and 84. N.B.—It can be argued that the judgments in *Evans' Case* on this point were *obiter* but it is suggested that they correctly reflect the modern view as to liability in trespass. Mr. P. A. Landon, the learned editor of *Pollock on Torts*, 15th ed., at p. 128, is satisfied that the case accepts the authority of *Stanley* v. *Powell*. He comments, " . . . all that one can do is to wring one's hands and to note this recent case as a striking illustration of the old maxim *communis error facit ius*. And the point is still an open one for the House of Lords."

[8] Austin was at pains to emphasise this distinction between will, *i.e.*, volition, and intention. He complained that " . . . numerous writers upon Jurisprudence . . . employ 'will' and 'intention' as synonymous or equivalent terms. They forget that intention does not imply will, or that the appropriate objects of certain intentions are not the appropriate objects of volition." Jurisprudence, at p. 421, cited with approval by Keeton, *Elementary Principles of Jurisprudence*, 2nd ed., at p. 208.

[9] Hobart 134 (1616) 80 E.R. at p. 284. It is true that in the same case there is a dictum to the effect that " if a lunatic hurt a man, he shall be answerable in trespass." But as Bohlen points out (*loc. cit.* at p. 552), the case was decided at a transitional point in English legal history when the courts were only tentatively moving away from the harsh strictness of the liability with fault concept.

defendant to his conduct, which is in question, and to its consequences, together with a desire for those consequences . . . ," though there may be an irresistible presumption of intending the necessary or natural consequences of one's acts.[10]

Therefore while Stable J.'s finding of fact, that the lunatic's mind " directed the blows he struck," was a finding that the act was intentional, it might have been argued on behalf of the defendant that his diseased mind rendered the act involuntary, and therefore non-tortious.

If the dictum cited above from *Weaver* v. *Ward* is valid, it is difficult to appreciate why a distinction should be made if it is a diseased brain rather than a human agent which guides the striking hand.

(b) In the same passage the learned judge states that the intention " must be averred and proved." This suggests that the onus of proof in an action of trespass is on the plaintiff. Is it true that the plaintiff must show that the defendant acted intentionally or negligently? To the writer's knowledge there is no authority for placing the burden of proof on either party. The Court of Appeal in *National Coal Board* v. *Evans* did not express an opinion on the point. But in the absence of authority it seems more logical to accept the usual view that in an action of trespass the onus of proof is on the defendant to show lack of intention or the absence of negligence on his part—in other words, to plead inevitable accident. In fact it is now almost true to say that the essential difference between actions of trespass and of negligence is in the placing of the burden of proof.

A further point raised in argument by learned counsel is worthy of note solely because Stable J., while rejecting it, found it " attractive." This was an attempt to distinguish the instant case from *Stanley* v. *Powell*[11] and *Holmes* v. *Mather*[12] on the ground that,

> " These cases may well be different from the present matter where the act complained of was a trespass, as direct an act of violence as possible. The injuries were not the indirect result of a legitimate activity gone wrong, but were the direct result of illegal behaviour, which was wrongful from the beginning and could not conceivably be anything else. *The distinction may be succinctly stated as being conduct tortious in its very essence and conduct innocent in itself, but becoming tortious by the addition of some ingredient such as intention, heedlessness, or malice* " (at p. 928).

With respect it is submitted that there is no authority for such a distinction which has only its subtlety to commend it.

(iii) The final matter to be considered was whether, " granted that the defendant knew the nature and quality of his act, it is a

[10] *Winfield's Law of Tort*, 5th ed., pp. 19–20.
[11] [1891] 1 Q.B. 86.
[12] (1875) L.R. 10 Exch. 261.

defence in this action that, owing to mental infirmity, he was incapable of knowing that his act was wrong " (at p. 928).

The learned judge concluded that it was no defence since " where there is the capacity to know the nature and quality of the act, that is sufficient although the mind directing the hand that did the wrong was diseased " (*ibid.*).

It is indisputable that ignorance of the wrongful nature of the act is no defence in tort. On the other hand, it is submitted that both (a) the capacity to know the nature and quality of the act, and (b) knowledge of wrongdoing, are two factors to be taken into consideration by the court in determining whether the defendant is capable of forming a culpable *intention*.

Moreover, it should not be assumed that mere knowledge of the nature or quality of one's acts is necessarily sufficient to constitute " a *voluntary* act, the mind prompting and directing the act which is relied on " (at p. 927). To make such an assumption would be to equate " *sciens* " with " *volens*."

The essential question in *Morriss* v. *Marsden* was whether, granted that the lunatic had a culpable intention, this catatomic schizophrenic could be held to have performed a *voluntary* act. In these spheres of learning where medical and legal theories come into contact, the results are rarely happy. But it is suggested that the lawyer should not ignore completely the indisputable advances in medical science. Professor Paton rightly comments that " Medicine, psycho-analysis, and psychiatry are opening new doors and the law will gradually be forced to reconsider the theories on which its analysis of an act is based, although it is as yet premature to seek in the new learning for definite and accepted hypotheses which can be made the basis of a new legal approach." [13] *Morriss* v. *Marsden* might suggest that a greater awareness by the lawyers of such " new doors " would be beneficial to the health of the Common Law.

Eric C. E. Todd.

Sale of Goods—Illegality

B. & B. Viennese Fashions v. *Losane* [1952] 1 All E.R. 909 is another illustration of the practical difficulties which may result from a failure to attend to adequate theoretical analysis. Realistic analysis of actual commercial transactions discloses, as I have previously shown, that a contract for the sale of goods is built up around promises by a vendor to deliver and a purchaser to accept particular goods which are either expressly or implicitly specified by them. Without clear realisation of the concept of defined contract goods there is an inadequate scheme for the classification of actual contracts. The limitation of categories to conditions and

[13] Paton, *Textbook of Jurisprudence* (1946) at pp. 233–4.

warranties creates a Procrustean bed in which different forms of contracts of sale are rudely handled. *Cheshire and Fifoot* does proclaim the existence of contractual terms which are neither conditions nor warranties, but fails to make clear all the distinctions between different situations. We are told that where there is a promise to deliver a racehorse the delivery of a carthorse is neither the breach of a condition nor of a warranty, but is " outside the contract altogether " (*Cheshire and Fifoot*, 2nd ed., p. 112). However, the phrase " a promise to deliver a racehorse " contains an ambiguity, similar to that pointed out by the court in *Smith* v. *Hughes* as occurring in the phrase " contracting for old oats." A promise to deliver an object which is defined as a racehorse has as its correlative a promise by the purchaser to accept such an object. There may, however, be a contract under which a vendor promises to deliver an object defined as a horse, and a purchaser promises to accept a horse *provided, however,* that it is a racehorse.

It is the first type of promise to which *Cheshire and Fifoot* refers. The analysis of the situation where non-contract goods are delivered may, however, be carried further. Where there is a contract of the first type, not only does the vendor who delivers a carthorse act outside the contract, so too does the purchaser who takes delivery of the carthorse. Only in the second type of contract is there a true " waiver " by a purchaser, *viz.*, the waiver of a condition. The acceptance of a carthorse may, according to circumstances, operate in various ways. One way in which it *cannot* operate is to convert delivery of a carthorse into performance of the promise to deliver an object defined as a racehorse.

In the instant case these basic, but simple, considerations were ignored, and in consequence the court found itself in difficulties in arriving at the correct solution of the case before it. There was a " bargain for the sale of non-utility jackets." The vendor delivered utility jackets, of which the purchaser took delivery in ignorance of the fact that they were not non-utility jackets. The jackets contained no utility marks, nor had an invoice been delivered appropriate for the sale of utility jackets. The vendor sued for the price fixed in the original contract. The defence, on which the purchaser succeeded in the Court of Appeal, was one of illegality. The illegality relied on was a breach by the vendor of art. 10 (1) of S.R. & O. 1947, No. 2642. This article provides:

> " A manufacturer of controlled goods shall in relation to the supply in pursuance of a contract of sale of any such goods, being utility goods manufactured by him, to a person other than a retail customer furnish to that person, not later than seven days after the supply of the goods, an invoice containing the particulars hereinafter specified."

The county court judge held that the contract was legal in its inception, and, distinguishing *Anderson, Ltd.* v. *Daniel* ([1924] 1 K.B. 138) that subsequent illegality did not avoid the contract.

The breach of contract constituted by the delivery of the utility jackets was waived when they were accepted by the purchasers. He gave judgment for the vendor.

In the Court of Appeal the view taken was that illegality arising from the breach of art. 10 (1) so tainted the contract that the vendor could not recover. *Anderson, Ltd.* v. *Daniel* was regarded as indistinguishable. Counsel for the vendor, it may be inferred, argued that there had been no breach of art. 10 (1) on the basis that the article only applied to the supply of utility goods in pursuance of a contract of sale of utility goods. Evershed M.R., considered this to be an unnatural reading of the article. The natural reading, he maintained in effect, was this: " a manufacturer of controlled goods shall in relation to the supply of any such goods, being utility goods manufactured by him (which supply was in pursuance of a contract of sale) . . . " " Any other reading," he said, " would leave the words ' in relation to the supply ' in the air." In my opinion the reading adopted leaves " contract of sale " in the air: the natural reading is to take the phrase " any such goods, being utility goods " as clearly qualifying " contract of sale," even though it also qualifies the phrase " in relation to the supply." It is an artificial reading which makes the phrase " of any such goods, being utility goods " qualify only " supply " without qualifying " contract of sale." Such a reading places brackets around " in pursuance of a contract of sale," and produces an unusual construction. In any case the possibility of double qualification cannot be entirely ignored, as it was by the Master of the Rolls.

Jenkins L.J. characterised the delivery of the utility jackets as " an illegal performance in view of the provisions of art. 10 (1)." He then proceeded, " The defendant firm accepted the goods so delivered and disposed of them. In my judgment, that course of events must taint the whole contract with illegality, just as much as if it had been in origin a contract for the sale of utility garments. To hold otherwise would produce this absurdity. The plaintiff comes to the court and claims payment for goods sold and delivered. To make out that claim he must show delivery of the goods, and the delivery he relies on is the delivery of utility garments without an invoice. Thus, the plaintiff must either admit that he is seeking to recover on an illegal contract or else he must set up his own breach of contract and say that this delivery of utility garments without an invoice, although illegal, was not a delivery in pursuance of the contract at all, with the surprising consequence that, notwithstanding the breach of contract, the illegality, the plaintiff is entitled to recover the contract price. It seems to me that this is an absurd result."

Absurdity is, however, not avoided by the court's solution of saying that the contract was tainted with illegality, for that conclusion produces the absurdity that a purchaser in a similar case

could not sue for breach of contract. The "surprising consequence," which it is said by Jenkins L.J. follows from saying that the delivery of the utility garments was not a delivery in pursuance of the contract, is, it is submitted, not a consequence at all. A vendor cannot recover the contract price by showing that he has not delivered the contract goods.

The solution of the case was indeed simple: and called for no strained interpretation of art. 10 (1). The original contract was for goods defined as non-utility jackets. The delivery of utility jackets was not a performance of the contract. The vendor suing for the original contract price could be met simply by the defence that the contract goods had not been delivered. The effect of the delivery and acceptance of the utility jackets has, however, to be considered. At most the vendor could say that such delivery and acceptance constituted a *new* contract. This new contract was one for the sale of utility jackets. Perhaps it could be said in one sense that the new contract involved a waiver of the breach of the original contract; but only in the sense of rescinding the original contract and substituting therefor a new contract for the sale of utility jackets. An action on the new contract is met by the plea of illegality, for there is no doubt as to the applicability of art. 10 (1) to a contract for the sale of utility goods. The phrase "in pursuance of" is not restricted to the situation where there has been an antecedent contract of sale. In the result the vendor could not succeed. A purchaser, however, could succeed in a counterclaim in such a case, for it is submitted that the acceptance of utility goods in ignorance of their character could not be taken as giving rise to a contract to rescind the original contract; and the purchaser could not be affected by the vendor's breach, if such it was, of art. 10 (1).

J. L. MONTROSE.

DIVORCE—CRUELTY—MISDIRECTION

IN *Fromhold* v. *Fromhold*, the first divorce case to be heard by a jury since 1939, Wallington J. directed the jury that in order to prove legal cruelty it was necessary to show that there had been injury to health even in a case of physical injury. He further told them that a magistrates' order based on the same facts as those alleged in the petition was nothing to do with them. He ruled as inadmissible the evidence of a witness who said that she had seen bruises and other injuries on the wife-petitioner because it was a complaint which was not made until about a week after the alleged assault. And finally, he did not read out in open court or disclose to the parties the contents of a note which the jury had sent him after they had retired to consider their verdict. On all these four accounts the Court of Appeal have held ([1952] 1 T.L.R. 1522) that the learned judge was wrong.

Singleton L.J. confessed to finding it a little difficult to understand the first misdirection. For " the wife's complaints were that she had been kicked on at least two occasions, so that there were bruises on her legs or on her body; that she had been struck on a hand with a knife in a way which caused a wound or wounds on the hand, and if these complaints were found by a jury to be true, I should not have thought that anyone could doubt that they were within the definition of cruelty as known to the law " (at p. 1525).

As to the magistrates' order, section 7 (2) of the Matrimonial Causes Act, 1950, provides: " On any such petition for divorce the court may treat the decree of judicial separation or the said (magistrates') order as sufficient proof of the adultery, desertion or other ground on which it was granted. . . ." Thus, although such an order is not as useful in a contested case as it is in an uncontested case, " the Legislature provides that the court may receive the order, and may treat it as sufficient proof of the ground on which it was granted. . . . The judge told the jury that the order had nothing to do with them, but that was not an accurate way of putting the wife's case. It would have been right had the judge said ' This order was made by the magistrates and is a factor in the case; it is not conclusive; you will bear it in mind, but you will decide this case upon the whole of the evidence given by both sides ' "—*per* Singleton L.J. (at p. 1526).

All three members of the court expressly concurred in holding that Wallington J.'s ruling on the inadmissibility of the proposed witness's evidence was wrong. The rejected evidence should have been admitted as it was relevant to prove the existence and nature of the alleged injuries. For the witness to say she had seen bruises did not amount to evidence of a complaint; it was merely evidence of fact.

However, " the actual statements made by the wife to the witness would not be admissible; they would be hearsay; and being made at some distance of time afterwards would not be admissible as complaints "—*per* Denning L.J. (at p. 1526).

There is no doubt that evidence of complaints by assaulted persons is admissible as an exception to the hearsay rule provided the complaint was made at the first reasonable opportunity. Thus, both the fact that the complaint was made and the particulars of the complaint are allowed in: *R.* v. *Lillyman* [1896] 2 Q.B. 167. But up till now it was generally considered that the admissibility of such evidence was confined only to complaints of sexual offences and to criminal proceedings: *R.* v. *Osborne* [1905] 1 K.B. 551, at 561. Indeed, *Phipson*, 9th ed., says, at p. 131, that the dictum of Bankes L.J. in *Jones* v. *S. E. Ry.* (1918) 87 L.J.K.B. 775, at 778, that such evidence is admissible on all charges of violence, civil or criminal, is not sustainable. Now apparently it is not the learned Lord Justice but the learned textbook writer that is not sustainable, for the Court of Appeal judgments make it clear that had the

petitioner complained sooner to the witness these complaints would have been receivable in evidence. Although it does not appear in the report, Mr. Simon, Q.C., for the wife petitioner, had referred in the course of his argument to *Berry* v. *Berry* (1898) 78 L.T. 688, in which Jeune P. had upheld the anomalous practice of the Divorce Court in allowing a witness to give evidence of the fact (though not the particulars) of a wife's complaint of her husband's cruelty without inquiring whether it was made at the first reasonable opportunity. But the court expressed their disfavour of this authority and Mr. Simon did not press his argument. *Berry* v. *Berry* is most likely no longer good law.

The fourth respect in which Wallington J. erred was in not reading out the jury's note. In commenting on this Singleton L.J. referred to *R.* v. *Green* [1950] 1 T.L.R. 64 and *R.* v. *Furlong* [1950] 1 T.L.R. 558, and said: "Both those cases arise on the criminal law. I do not know why there should be any difference of practice between cases under the criminal law, or under the civil law, or in matrimonial causes. If there be a communication between judge and jury, prima facie the litigants on both sides and their counsel are entitled to know what that communication is" (at p. 1524).

Though it again does not appear from the report, Wallington J. had said in his summing up that this was a case in which there was no corroboration. Mr. Simon contended that this was misdirection since the evidence as to the bruises, if rightly admitted, would in fact have amounted to corroboration. He argued that corroboration was: "facts which tend to render more probable the truth of a witness's testimony on any material point" (*Phipson*, 9th ed., at p. 511). The need for such facts also to implicate the accused only applied to the corroboration of an accomplice in a criminal proceeding: *R.* v. *Baskerville* [1916] 2 K.B. 658. Therefore, the fact that the evidence of the instant witness did not implicate the husband did not prevent it from being corroboration as it rendered the wife's testimony more probable on the material point of the existence of the physical injuries.

Singleton L.J. refused to say anything on this point. But Denning L.J. held that the rejected evidence would have been "corroboration in the sense in which it is used in the Divorce Court" though it would not be "corroboration in the sense in which that word is used in the criminal courts" (at p. 1526). Hodson L.J. did not agree with this new-found double meaning of the word corroboration. Though agreeing with Singleton L.J. that the matter did not now fall to be decided, he was of the view that corroboration in all cases had to implicate the accused and that such evidence as was in issue here could only amount to corroboration if the parties were living together at the time since such a contemporaneous cohabitation provided a sufficient linking with the party charged to implicate him.

That Hodson L.J.'s view is correct and that the strict meaning of corroboration should prevail even in the Divorce Court is perhaps borne out by dicta of Sir Boyd Merriman P. in *D. B.* v. *W. B.* [1935] P. 80. In that case the learned President held that evidence of the fact of a complaint by a wife to her doctor of her husband's cruelty, though admissible as relevant to her nervous condition at the time, was "no evidence whatever implicating the husband in connection with the alleged acts . . . if corroboration was necessary I think the justices were right in saying that there was none" (at p. 85).

FENTON BRESLER.

ARREST

THE decision of the Court of Appeal noted *ante*, Vol. 14, p. 489, has been reversed by the House of Lords: *John Lewis & Co. Ltd.* v. *Tims* [1952] 1 All E.R. 1203. Apart from special statute, a person arrested need not be taken before a magistrate forthwith, but only within a reasonable time, and it is not unreasonable for the arrester to delay (*a*) to get the decision of his superior as to whether to prosecute or (*b*) in order to give the arrested person an opportunity of offering an explanation.

The decision emphasises the chaotic character of the law of arrest, because it seems that if the arrest is made under some of the special statutes which use the word "forthwith," even a reasonable delay invalidates the arrest.

The decision below was called *Tims* v. *John Lewis*, and since Tims was the plaintiff, this is the name that tends to stick in the mind. Will not someone alter the inconvenient practice of reversing the names of parties in the House of Lords? It frequently involves delay in tracing a case in a work of reference. This appeal is addressed particularly to the Editor of the *Law Reports*: if he will use his authority to keep the case to the same name throughout its career, other reports may summon the courage to follow suit.

GLANVILLE WILLIAMS.

"MY EXECUTORS' DECISION SHALL BE FINAL"?

THERE have recently been instances in several fields where the courts have shown considerable vigour in preserving their jurisdiction. One of the outstanding, and perhaps the most controversial, of these cases is *Re Wynn's Will Trusts* [1952] 1 All E.R. 341, where the testator had attempted to avoid loss to his estate as a result of construction summonses and the like. By his will he empowered his executors to determine what articles passed under any specific bequest, and "whether any moneys are to be considered as capital or income and how valuations are to be made . . . and to determine

all questions of doubt arising in the execution of the trusts of this my will . . . and I declare that every such determination shall be conclusive and binding upon all persons interested." On a question of the apportionment of the proceeds of sale of some timber this clause was held invalid on the grounds (a) that it was contrary to public policy as excluding the jurisdiction of the court, and (b) that it imposed a condition repugnant to the nature of the gifts in the will.

The grounds of repugnancy (that the discretionary powers could defeat the expectations of beneficiaries and were thus repugnant to the gifts) are perhaps the least satisfactory, though in applying this doctrine in the present case, Danckwerts J. was following *Re Raven* [1915] 1 Ch. 673, where the power given was to determine the identity of a beneficiary. It should be remembered that beneficiaries are merely claiming a gift, and as Uthwatt J. said in *Re Tankard* [1942] Ch. 69: "Beneficiaries take their interest under the will only on the terms of the will," and "Beneficiaries cannot complain if the terms of the will are adhered to." On this basis there can logically be nothing repugnant to the nature of the gift in a condition which is of the essence of the gift. If the testator chooses to make the receipt of his bounty uncertain the beneficiaries may be unhappy but they suffer no loss of anything which was theirs by right. It would, it seems, be as reasonable to regard as repugnant the discretionary part of a discretionary trust on the grounds that such a discretion makes any benefit to the beneficiaries entirely dependent upon the goodwill of the trustee. To give a power to trustees to apportion can scarcely be regarded as a more serious potential deprivation of the beneficiaries' hopes than to give a power to determine whether the beneficiary shall receive anything or nothing. Yet by the cases one gift is good and one bad. It is true that there is between them something of the distinction between gifts upon condition and determinable interests, but that distinction is often one without substantial merit, depending on the technique of drafting. The end that cannot be achieved by condition because of "repugnancy" can be obtained through a determinable interest. There seems in wills to be little point in preserving rules and distinctions which are capable of defeating the clear intent of the testator merely because of faulty drafting.[1]

In the present case the application of the doctrine is particularly unhappy. It stops the trustees making a final apportionment and therefore leaves it to the law to perform that task. The result between beneficiaries could be precisely the same whichever course were followed. It must also be remembered that there is nothing sacred in the apportionment rules of law; they can be entirely

[1] This is particularly true when the rules themselves are, as is the doctrine of repugnancy, unattractive in logic and their operation. See generally the articles by Professor Glanville Williams in 59 and 60 L.Q.R., "The doctrine of repugnancy" and particularly Vol. 60, at p. 82.

excluded, and often are, largely because their intricacy all too frequently involves the expense of litigation if the executor or trustee is to feel secure.[2] If the rules can be excluded there seems little harm in the testator providing his own simpler rules or, since he cannot envisage all possibilities, providing his own machinery for determining the matter, which will be simpler, cheaper and quicker than the machinery of the courts.

The difficulty in providing that machinery lies not only in this doctrine of repugnancy, but in the application of the rules of public policy. The doctrine of repugnancy, if unattractive, is not novel. In the application of public policy there is a certain novelty, the application of a particular head of public policy to wills.[3] The clause failed as contrary to public policy, as being " an attempt to oust the jurisdiction of the court to construe the will and to control the administration of the testator's estate." Authority for this was found in the arbitration cases such as *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478. Whether those cases are *in pari materia* may, with respect, be doubted. The power of the court is in arbitration preserved by statute (see *e.g.*, section 21 of the Arbitration Act, 1950), and the position of persons in commercial relationship with one another is hardly the same as that of donor and donee. Further, in wills it has been recognised that a condition that the beneficiary shall not dispute a will is good (*Cooke* v. *Turner* (1846) 15 M. & W. 727), at any rate where, when annexed to personalty, it does not offend the *in terrorem* doctrine. This has been so held, even where the condition was against disputing the validity of a will, yet there can be no greater public interest in the supervision of construction than in the decision of validity of a will. Indeed, it was said by Rolfe B. in that case, " But in the case of a condition such as that before us, the State has no interest whatever apart from the interest of the parties themselves. . . . It matters not to the State whether the land is enjoyed by the heir or the devisee; and we conceive therefore that the law leaves the parties to make just what arrangements they may think expedient as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of the property to one claimant rather than another." With the substitution of tenant for life and remainderman for heir and devisee in that quotation it would seem to cover the present case precisely. If *Re Wynn's Will Trusts* is to stand, these earlier authorities, not hitherto challenged, must be reconsidered.

It is true that it is possible to go too far with such conditions. Thus, in *Re Williams* [1912] 1 Ch. 399, it was held that a clause

[2] This is a matter of increased importance since it is probably generally true that trust corporations are less willing than private persons to take the risk of making wrong decisions. For that no one can blame them, but it does unhappily mean an increase in litigation.

[3] It should be remembered that the clause here in question was not new-fangled, but well enough established to be in all the standard precedent books.

that if proceedings were taken by a beneficiary all costs of parties should come out of the beneficiaries' share did not apply to proceedings instituted when the executors were guilty of wilful default, having withheld capital money for years. Here, it seems is the true limit of public policy, namely that the only essential jurisdiction of the court is to prevent fraud. Added strength is given to this supposition by a Scottish case, *Dundee General Hospital* v. *Walker* [1952] 1 All E.R. 897, where there was a gift to the hospitals "if my trustees shall in their sole and absolute discretion be satisfied that the said infirmary has not been taken over wholly or partly by or otherwise placed under control of the State." These words were used, said Lord Normand, since the testator "wished to make manifest his intention that the trustees' failure to be satisfied should be final and conclusive and not subject to correction by a court of law." In reply to the objection that on this view the testator had committed to his trustees not only the construction of his will but also of a statute, Lord Normand added, "I would not deny that, but no case was cited to us, nor do I know of any which would compel me to treat as invalid the condition as I have construed it," saying also that the words may have been used "solely in order to exclude from the purview of the courts the kind of questions which have occupied so large a part of the time given to this appeal." He was prepared to hold that the decision of the trustees would be final, unless it could be shown that it had been reached dishonestly. That is a far cry from *Re Wynn's Will Trusts*, but the suggested interpretation of *Re Williams* accords with the House of Lords decision.

So far as English testators are concerned *Re Wynn's Will Trusts* means that such clauses must be avoided unless the testator is prepared first to risk his estate in further litigation [4] on their validity, and the present spate of construction summonses is likely to grow. North of the Border other opinions have prevailed, and there may now be added point in draftsmen making sure that the Scottish domicile of their testators can be established so that the material validity of such provisions may be tested by Scottish law.

J. D. B. Mitchell.

Breach of Statutory Duty—Contributory Negligence

The Court of Appeal has no power to overrule its own previous decisions, but it can leave them on the shelf; and this is what has happened to *Vyner* v. *Waldenberg Brothers, Ltd.* [1946] K.B. 50. The latest case on the problem (the burden of proof in actions for

[4] There is one way of distinguishing this case. The summons was taken out by the trustees, and, despite what has been said, there may well be no objection to the trustees themselves seeking the opinion of the court. Unfortunately there is in the report no suggestion that the argument played any part at all in the decision.

breach of statutory duty) is *Watts* v. *Enfield Rolling Mills (Aluminium), Ltd.* [1952] 1 All E.R. 1013, where Denning L.J. expressed the view of the court as follows: "The first burden which is always on the plaintiff is this. He must show that his injury was caused by the relevant danger, *i.e.*, by the danger against which Parliament intended to guard him, such as a circular saw, a flying fragment, a revolving belt, or such like. When that is proved or admitted, then the second thing which the plaintiff must show is that there was a breach of a statutory duty which was intended to guard against that very danger. When both of these matters are proved, the proper inference is that the breach was the cause of the injury unless the occupier of the factory proves that it was not."

The facts of *Watts' Case* were as follows. The occupiers of a factory were under a statutory duty by the Protection of Eyes Regulations to provide goggles where workmen were "cutting out . . . bolts from . . . plant." They broke this duty, and a workman lost an eye when cutting out bolts from plant; but it was not certain whether he lost the eye by reason of a flying bolt or because he hit it against part of the plant. It was held that the workman, having failed to discharge the first burden named by Denning L.J., failed in the action.

This decision is in effect, though not avowedly, a complete reversal of *Vyner* v. *Waldenberg*, which had been followed in *Schwalb* v. *H. Fass & Son, Ltd.* (1946) 175 L.T. 345. The rule in *Vyner* v. *Waldenberg* was that "if there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that the principle lies at the very basis of statutory rules of absolute duty." This was in a judgment delivered by Scott L.J. in June, 1945, the other members of the court being MacKinnon and Morton L.JJ. By December, 1945, MacKinnon L.J. had changed his mind on this general principle, because in the judgment that he delivered on behalf of the Court of Appeal in *Mist* v. *Toleman & Sons* [1946] 1 All E.R. 139, he severely restricted it. According to *Mist* v. *Toleman*, the principle of *Vyner* v. *Waldenberg* applies only where the statutory regulations are designed to prevent a particular class of accidents, not where they are designed to prevent all or any of a number of classes of accidents; in the latter case there is no presumption to aid the plaintiff. In *Mist* v. *Toleman*, there was a statutory duty to prevent dust, the object of which was to prevent every possible uncomfortable, offensive or injurious effect due to the presence of dust. When a workman contracted tuberculosis, allegedly but not clearly as a result of dust, tuberculosis could not be said to be the particular thing in the mind of the legislature; it was only one of the things. Accordingly, the workman failed in his action.

It may be said without disrespect that this was distinguishing for the sake of distinguishing. No reason was advanced for it, and there is obviously much difficulty in drawing a line between a particular class of accidents and a number of classes of accidents. Suppose that an Order has for its object the prevention of dust, and that the Order expressly declares that it is made in order to prevent workmen contracting tuberculosis, silicosis, and other diseases caused or contributed to by dust. If the Order is disobeyed and a workman contracts tuberculosis, is the injurious effect (tuberculosis) the particular thing in the mind of the legislature, or only one of the things? Does "particular" mean that the injury must be specified by name in the legislation, or does it mean that only one injury must be in the mind of the legislature? Whichever question is asked, why should the answer to it have any bearing upon the incidence of the burden of proof?

Whatever ambit *Mist* v. *Toleman* may have left to the rule in *Vyner* v. *Waldenberg*, it might have been thought that the facts in *Watts' Case* fell within it. The regulations in *Watts' Case* were called the Protection of Eyes Regulations, and they had one and only one object, namely, to protect eyes. Hence, they were, within the formula in *Mist* v. *Toleman*, designed to prevent a particular class of accidents, not to prevent all or any of a number of classes of accidents. This being so, it is mysterious in the extreme that the Court of Appeal failed to apply the rule in *Vyner* v. *Waldenberg*. It may be that the practical conclusion is that that case is in effect overruled, notwithstanding the lip service still paid to it.

However, the law cannot be regarded as certain, because two or three weeks after the decision of the Court of Appeal in *Watts' Case*, Donovan J. applied *Vyner* v. *Waldenberg*, his attention not being called to *Watts' Case*. This was in *Cork* v. *Kirby Maclean, Ltd.* [1952] 1 All E.R. 1064, on appeal [1952] 2 All E.R. 402. A man was working on a platform which, in breach of the defendants' statutory duty, was too narrow and was not provided with guard-rails. The man had an epileptic fit and fell off. Donovan J. held that, since there was a breach of duty, and since the injury, namely, falling, was that designed to be prevented by the regulations, the burden lay on the defendants to show that the accident would have happened even if the platform had complied with the regulations. Since they could not do this, the action succeeded. It is submitted that this result was the right one, and it shows the value of the rule in *Vyner* v. *Waldenberg*.

Another part of the judgment of Donovan J. was plainly wrong. The defendants, the occupiers of the factory, contended that they were absolved from liability because the workman had concealed from them the fact that he was an epileptic and was forbidden to work at heights. Apparently the defence was one of contributory negligence, although the learned judge did not call it that, and if there was contributory negligence the normal result would be not

absolution from liability but apportionment of the damage. However, the judge ruled against the defence, for the somewhat surprising reason that " otherwise the courts would soon be engaged on compiling a list of legally notifiable disorders." On appeal to the Court of Appeal this part of the judgment was reversed, the plaintiff's damages being reduced by one-half under the Contributory Negligence Act. The odd thing is that the Court of Appeal did not discuss the question how Donovan J.'s judgment on the onus issue could be reconciled with their own decision in *Watts' Case*.

Glanville Williams.

Mercantile Agents and the Single Transaction

It seems strange that the recent case of *Jerome* v. *Bentley & Co.* [1952] 2 All E.R. 114, should have been decided without any reference to mercantile agents. The plaintiff in that case entrusted a ring to a Major Tatham, who had asserted that he could sell it among his circle of friends. The arrangement was that the Major would sell it, in his own name or in the name of the plaintiff, and retain whatever amount he received for it over the sum of £550 wanted by the plaintiff; or, if he did not sell it within seven days, the Major was to return it. After the seven days had elapsed, the Major sold it to the defendants, a firm of Bond Street jewellers, who resold it the same day. The Major was subsequently convicted of larceny by a bailee, and thereafter the plaintiff offered to accept £100 from the defendants in full settlement of his claim against them in respect of the ring. This offer was not accepted, and a formal demand was made by the plaintiff to the defendants for the return of the ring, but the defendants replied that they had bought it in good faith and had resold it.

The decision proceeded on the ground that, at the time of the sale, Major Tatham had no authority to deal with the ring in any way except for the purpose of its safe custody. The property in the ring did not pass to the defendants, nor had the plaintiff done anything to mislead the defendants whereby he might be said to have " enabled " the Major to occasion the loss of the defendants (within the celebrated dictum from *Lickbarrow* v. *Mason* (1787) 2 T.R. 63), and whereby he would be prevented from setting up his title as against the defendants. Judgment was therefore given for the plaintiff for £250, the assessed value of the ring.

The main argument for the defendants appears to have been that they should have been given notice of the limitation of seven days placed upon the authority of the Major to sell, and that, in the absence of such notice, the plaintiff could not rely on that limitation to prevent the property from passing on the sale of the ring to them. It is, of course, well-established that, where an agent has ostensible authority to deal with goods on behalf of the

owner, secret limitations on that authority, which may have been agreed between principal and agent but are not communicated to the third party with whom the agent deals, cannot operate to render invalid, as against the principal, acts done by the agent within the limits of that ostensible authority. But the learned judge, Donovan J., soon dealt with that argument of the defence by stating shortly, " the defendants knew nothing of the plaintiff . . . they dealt with (Major Tatham) on the footing of a principal selling his own property." How then could they possibly assert that they had been prejudicially affected by lack of notice of the time-limit set upon his authority as agent? Moreover, as the learned judge remarked, he could not help wondering how the plaintiff was to give such notice, " for he did not know to whom out of the whole population Major Tatham would offer the ring."

There are, however, circumstances in which this doctrine of ostensible authority has been allowed to operate even where the agent has not in fact been held out as such by the principal, but has been clothed, as it were, with this ostensible authority by virtue of his office or position, even though he may have been treated as a principal by the third party. An illustration of this development is seen in the case of *Watteau* v. *Fenwick* [1893] 1 Q.B. 346, which was naturally cited by the present defendants. In that case, the defendants were the owners of an hotel which was managed by one, Humble, who had previously owned the hotel himself and whose name was still painted over the door. Under the terms of the agreement between Humble and the defendants, Humble had no authority to buy any goods for the business except bottled ales and mineral waters. In fact, Humble purchased other goods, namely, cigars and bovril, from the plaintiffs, who gave credit to Humble alone, knowing nothing of the defendants. These goods were not paid for, whereupon the plaintiffs discovered that the hotel was owned by the defendants and proceeded to sue them for the price. The learned county court judge gave judgment for the plaintiffs, and this judgment was upheld on appeal to the Queen's Bench Division, where Wills J., delivering judgment for himself and for Lord Coleridge C.J., declared the correct principle to be that " once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority " (p. 348). And this was so even in a case where the person supplying the goods knew nothing of the existence of a principal. " Otherwise . . . in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal " (p. 349).

Donovan J., in the present case, distinguished *Watteau* v. *Fenwick* on two grounds. "In the first place, beerhouse managers are a well-known class of agent. I suppose it is common knowledge that for certain purposes they are or may be the agents of the brewers who own the house. In relation to such managers it is easy to apply the phrase 'the authority usually confided to an agent of that character.' But Major Tatham belonged to no such well-known class of agent." The second ground for distinction was that Humble was indeed an agent of the defendants to buy *some* goods for the principal's business, so that he "simply exceeded an existing authority to buy," whereas "Major Tatham did more than exceed an authority to sell—he usurped it."

With respect, however, it might well be doubted if *Watteau* v. *Fenwick* would in fact have been decided the other way if Humble had had no authority to buy any goods at all and had usurped that authority. According to the reasoning of that decision, a secret limitation as to the nature of acts permitted to the agent is just as ineffective as against a third party as is a secret limitation as to the scope of those acts which are permitted. The vital factor is the "authority which is *usually* confided to an agent of that character." The first ground for distinguishing would appear to be much more satisfactory, in that the principle of *Watteau* v. *Fenwick* may be said to apply only to cases where the agent is one of a well-known class of professional agents or managers acting within the scope of the usual authority of that class of agent. Thus, in *Watteau* v. *Fenwick* itself, at p. 348, Wills J. says: "The cigars, however, were such as would usually be supplied to and dealt in at such an establishment." On the other hand, as Donovan J. expressed it in the instant case at p. 116, "One cannot usefully speak in his (Major Tatham's) case of an act within the authority usually confided to agents such as he."

It is submitted, however, that a more profitable line for the defendants in *Jerome* v. *Bentley* might have been to assert that the Major was in fact a mercantile agent so as to bring into operation the Factors Act of 1889. The objection might be raised that Major Tatham could not possibly be such an agent in view of the description of him given by the learned judge, "simply a private individual, carrying on, so far as I know, no calling at all. . . ." There is, however, the case of *Heyman* v. *Flewker* (1863) 13 C.B.(N.S.) 519, where an insurance agent was held to be an agent within the Factors Act, 1842, although it was only on one particular occasion that he was entrusted with pictures to sell on commission. In delivering the judgment of the Court of Common Pleas in that case, Willes J. said that the term "agent" within the meaning of the 1842 Act included only "persons whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the act has taken its

name. The employment of Inman (the insurance agent) did strictly correspond, though in a small way, to that of a factor, because the defendant did not merely entrust him with the possession of the goods for safe custody, but employed him to sell the goods so entrusted to him upon commission" (pp. 527–528).

It is acknowledged that this case was decided on the meaning of the term "agent" within the Act of 1842, and not on the corresponding phrase "mercantile agent," which is found in the Act of 1889; but it is worth while recalling what Stirling J. had to say of this decision in *Tremoille* v. *Christie* (1893) 69 L.T. 338, a case also decided on the 1842 Act. "The judgment was delivered by Willes J., than whom there is no higher authority upon such a question." Stirling J. went on to say that he was bound by that decision on the interpretation of the 1842 Act, in spite of the later decision of *Hastings* v. *Pearson* [1893] 1 Q.B. 62, which held that the Act of 1889 applied only to persons of the class ordinarily carrying on the business of mercantile agents. He conceded, however, that "it may be that when a case similar to *Heyman* v. *Flewker* again arises there may be a serious question whether the provisions of the Act of 1889 are to be applied in the same way as the provisions (of the 1842 Act) were applied in *Heyman* v. *Flewker*, but with that I have nothing to do" (p. 340).

This decision of *Hastings* v. *Pearson* was, however, itself overruled by the Court of Appeal in *Weiner* v. *Harris* [1910] 1 K.B. 285, on the very point of the interpretation of "mercantile agent" under the 1889 Act, and no less an authority than Wright J., as he then was, in the Aubusson tapestry case of *Lowther* v. *Harris* [1927] 1 K.B. 393, considered *Heyman* v. *Flewker* to be still good law. "It is also contended that even if he were an agent he was acting as such for one principal only, the plaintiff, and that the Factors Act, 1889, requires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in *Heyman* v. *Flewker*, and I think the law is the same under the present Act" (p. 398).

It must be conceded that the agent in *Lowther* v. *Harris* was the owner of a small business dealing in antiques, principally glass and china, but this fact can hardly be considered vital in view of the general words of Wright J., and, in particular, his approval of *Heyman* v. *Flewker*. Moreover, in *Budberg* v. *Jerwood and Ward* (1934) 51 T.L.R. 99, where a lawyer was entrusted by a friend with a necklace for sale, Macnaghten J. readily accepted the proposition that a man could be a mercantile agent although he had only one customer, but held that the Factors Act did not apply in that case solely because the lawyer was acting as a friend and not in a business capacity, as there was no suggestion of remuneration.

In the light of these authorities, it is surely arguable, to say the least, that Major Tatham was a mercantile agent, and once this

obstacle is cleared, the defendants have a straight run home under section 2 of the Factors Act, 1889, of which subsection (1) enacts that a sale by a mercantile agent who is in possession of goods with the consent of the owner, and who is acting in the ordinary course of business of a mercantile agent, shall be as valid as if it were expressly authorised by the owner, provided that the third party acts in good faith and without notice of the agent's lack of authority; while subsection (2) provides that, once a mercantile agent has been in possession of goods with the consent of the owner, a sale by the agent even after the consent has been determined shall be equally valid, provided that the third party has no notice of the determination of the consent.

The requirement that the mercantile agent should be acting in the ordinary course of business of a mercantile agent was fully discussed by the Court of Appeal in *Oppenheimer* v. *Attenborough & Son* [1908] 1 K.B. 221, where Kennedy L.J. had this comment to make, at p. 232, "It was contended that the expression implies that the pledgee" (for the goods in that case were pledged, not sold, by the agent) "must know that the pledgor was an agent. I do not think that contention well-founded. It seems on the face of it to be a strange contention, because a pledgee ought rather to be more protected if he does not know that the pledgor is an agent than if he knows the pledgor's business to be that of agent." In the opinion of Lord Alverstone in that case, at p. 227, "the words 'acting in the ordinary course of business of a mercantile agent' mean that the person must act in the transaction as a mercantile agent would act if he were carrying out a transaction which he was authorised by his master to carry out." The conduct of the Major in selling the ring will readily fall within this interpretation, especially as it was found as a fact that the defendants acted in good faith, so that there could have been nothing to take the transaction outside the ordinary course of business.

It may be objected that such a finding, that the Major in this case was a mercantile agent, would bring about the startling result that every person who was even once entrusted with goods would be a temporary mercantile agent. In point of fact, it would not have such far-reaching consequences as might at first be feared. The goods would have to be entrusted to the agent for sale, as contrasted with safe custody, hire, use, etc., so that the agent's employment would "strictly correspond, though in a small way, to that of a factor" (*Heyman* v. *Flewker*, *ante*), and they must be entrusted to him for sale at a remuneration (*Budberg* v. *Jerwood and Ward*, *ante*). Furthermore, the situation would arise only where the agent sells in contravention of a limitation placed upon his authority by his principal, such as a limitation as to the duration of his authority, as in our present case, or a limitation as to the lowest price to be accepted by the agent, and this limitation is not

known to the third party. Even in these cases the application of the Factors Act would not invariably produce a new result, for the ground is already covered to some extent, partly by the general doctrine of ostensible authority, where the principal holds out the agent as such to the third party, and partly by the principle of *Watteau* v. *Fenwick*, where the agent is one of a class of professional agents or managers, and in such a case, as we have seen, it is irrelevant that the third party may believe the agent to be the principal.

Such a belief is similarly irrelevant for the application of the Factors Act, *cf.* Buckley L.J. in *Oppenheimer* v. *Attenborough & Son* (*ante*, at p. 229), " The question whether the person with whom the pledgor was dealing believed him to be an agent, or believed him to be the owner of the goods, is a question that is not material for the purposes of the Factors Act." Consequently, once we accept, as we must, that the whole application of the Factors Act is governed by objective, not subjective, standards, *i.e.*, depending on whether the agent is indeed a mercantile agent, and not whether he is known to the third party as such, then, it is submitted, a more logical, and no less just, result is achieved by allowing the Act to operate in such circumstances as those in *Jerome* v. *Bentley*.

C. F. Parker.

Agency and Fraud—Further Comment

The decision of the Court of Appeal in *Armstrong* v. *Strain* restores order and logic in the law relating to fraudulent misrepresentation after the disturbance caused by the earlier decision of the same court in *London and County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property Trust*. The story of this incident has been told in full, and the present position has been explained, by Professor Gower recently, in Vol. 15, p. 232 of this *Review*, so that it is not necessary to do so again. But Professor Gower has added some reflections to his account which call for comment, since they appear inconsistent in aim, and since they do not expose that defect in the law which this decision reveals.

Professor Gower draws attention to the hardship suffered by the plaintiff in *Armstrong* v. *Strain*, who received no compensation for the loss he had suffered other than expressions of judicial sympathy. This situation, one would have thought, called for an exploration of the possibilities of relief for the plaintiff. Indeed, in the last of his three observations Professor Gower pursues this course. But his first and principal comment is one which tends to relieve the defendant and, therefore, to aggravate correspondingly the burden of the plaintiff. Professor Gower doubts whether it is socially desirable or logically satisfying to brand one man as fraudulent where someone else has been fraudulent. This, of

course, amounts to no less than an attack upon the principle of *respondeat superior* in relation to fraud. Professor Gower at once admits that this is now established beyond question, and he concentrates his criticism upon the case of a principal who is held liable in fraud because his agent innocently makes a false statement, and a second agent knows that it is false and that it is being made. This is the situation which arose in the *Berkeley Case*, as now explained. Professor Gower considers it unjust to brand the principal as fraudulent since neither the first nor the second agent would be personally liable for fraud.

But, in the first place, it seems very improbable that the second agent—Addis in the *Berkeley Case*—would escape personal liability, if a plaintiff should prefer to proceed against him rather than against the principal. He has *mens rea* and he has done the *actus reus* through the first agent who, although the agent of the principal, is also the innocent agent (in the sense of the criminal law) of the second agent.

Secondly, it is quite misleading to say the principal is branded as fraudulent if he is held liable to pay damages for the fraud of his agent or servant. The imputation of the acts of an agent to his principal is justified, logically and morally, by the principal's authorisation, and in the more common case of vicarious liability for a servant there is by definition no question of stigmatising the master.

Professor Gower's second observation is concerned with the fears expressed by Lord Justice Singleton that *Armstrong* v. *Strain* might lead to difficulties in the case of a company "which can only speak or act through its agents or officers." Lord Justice Singleton here seemed to have fallen into the common error of imagining that a legal person can only act through agents or servants. But Professor Gower is not content to correct this and to point out that companies can act *in person* through their organs, such as the board of directors. He also suggests that the act of each member of the governing body should be treated as if done with the knowledge possessed by all the other members.

It is not quite clear whether the proposed rule under which a company would not "escape liability for the misstatements of one managing director on the ground that he was ignorant of facts known to another" is to apply even where the other did not know that the statement was being made. If not, Professor Gower's suggestion would achieve no more than what would follow from looking upon directors as agents of the company. As it is intended to provide an additional safeguard against companies escaping liability, knowledge that the statement is being made cannot, therefore, be thought essential. Read in this sense the suggestion certainly breaks new ground. But it deals with the states of mind of directors precisely in the way in which, as Mr. Justice Devlin has demonstrated, the states of mind of agents

cannot be treated, namely, it adds one innocent state of mind to another equally innocent in order to get a dishonest state of mind as the result. The notion of the collective mind of the governing body of a company cannot be used in answer to this. The mind of a company is, after all, only a fiction, useful to distinguish between directors and subordinate officers but dangerous if employed for other purposes. In practice, Professor Gower's suggestion might impose an almost unbearable degree of caution upon directors, especially if it is remembered that a company has organs apart from its board of directors.

In his final comment on *Armstrong* v. *Strain* Professor Gower regrets that the plaintiff did not attempt to ask for rescission, a claim which could only be defeated by the discredited rule in *Angel* v. *Jay*. Although one would welcome the final disappearance of this rule, it is doubtful whether rescission would be an adequate remedy for the plaintiff. The right to rescind for innocent misrepresentation can be lost for many reasons and, in any case, it will not compensate the plaintiff for his injuries. To recover such compensation the plaintiff must attempt strict proof of fraud. Although this attempt failed in the present case it might have been possible to prove negligence. But as damages cannot be recovered for negligent misrepresentations the plaintiff in cases of this kind is forced into an action for fraud. The defect of our law which is illustrated by this case is, therefore, not the rule in *Angel* v. *Jay*, but the denial of damages for negligent misrepresentations.

This denial was understandable when *caveat emptor* prevailed and when contributory negligence was an absolute defence. These and many other rules which showed that the individual was expected to be able to look after his own interests have had to be abandoned or qualified. The changed conditions which brought about these developments are also seen in that an enormous number of transactions are now conducted between parties of whom one acts in person whereas the other is assisted by numerous servants and agents. This indicates disparity of bargaining resources. At the same time, mistakes may occur leading to misstatements which could not have been made if the negotiations had been conducted in person. This danger grows in proportion to the size and complexity of the organisation employed. It is clearly unjust that the risk should be made to fall on the weaker of the parties and, indeed, paradoxical that the burden of this risk should be heaviest where the inequality of bargaining strength is most pronounced.

This paradox may have inspired Lord Justice Singleton's fears of difficulties in the case of misrepresentations made on behalf of companies, it may even have contributed to the decision given in the *Berkeley Case* (*cf.* the comment on this decision in 1 M.L.R. 149). *Armstrong* v. *Strain* has decided that the solution cannot be

sought in relaxing the rules concerning fraud. It has, it is submitted, also demonstrated that it will be found in abolishing the rule recently affirmed in *Candler* v. *Crane* [1951] 1 All E.R. 426.

J. Unger.

[Mr. Unger perhaps understates the value of rescission, having regard to the wide powers of the court to order restitution. Had the Armstrongs been able to return the remains of the bungalow and to get back the purchase price they would presumably have been reasonably content or, at any rate, less discontented than they must now be.—L. C. B. G.]

REVIEWS

Kenny's Outlines of Criminal Law. An Entirely New Edition. By J. W. Cecil Turner, M.C., M.A., LL.B. [Cambridge University Press. 1952. liv and 576 pp. 42s.]

In this work (at p. 28) it is said that "sometimes an adjective is combined with a noun so as to create a composite name with a new and special meaning, and, if so, great confusion will be caused unless this special meaning is made known and the composite noun thereafter employed only in that sense." To the uninitiated, an "entirely new edition" may convey little more than "a new edition," and be as meaningless as "gross" or "criminal" added to the noun "negligence." But let it be proclaimed that the words "entirely new" added to the noun "Kenny" constitute a special novel creation. This is transubstantiation, not just a face-lifting operation. The old elements are there (with all their old compelling charm and attractiveness) but transformed, invigorated, developed, and modernised with all the care and skill of the greatest of our modern English teachers of criminal law. It is a monument of painstaking labours and analytical accomplishment coupled with that profound expertise in judgment of what is required of a students' textbook which can only come from long experience of teaching a subject to generations of undergraduates. To the casual reader Mr. Turner's selection of points for emphasis and of illustrative cases may not signify much. In fact, to those who have had to face the same teaching problems, it is a marvel of ripe judgment. The long wait for the new *Kenny* has been infinitely worth while. We have now a textbook worthy of the subject—and the subject will become more worthy because of the textbook.

In this review there would be little point in traversing again the familiar ground of those topics to which Mr. Turner has made special contributions over the years, which are now infused into the text of this work, such as his analysis of the factual and mental elements of crimes at common law, his views on attempts, manslaughter and the motoring offences, his expositions of debatable problems in the law of larceny, and so on. In this volume there are plentiful points for discussion, but not in a review. But we can note Mr. Turner's appendix on the meaning of "Credit" (which in later editions may well be incorporated in the text) and his able summary, also in an appendix, of rules as to admission of evidence which reveals to the jury facts discreditable to the accused. This may well prove most useful to teachers (and it was Popham C.J. who asked, "Are not the judges of the law professors of the law?") and students: experience will show whether it is not too concentrated for old digestive systems, and for all but the toughest of the young.

The first, and debatable, issue raised by this "entirely new edition" is whether it is desirable to try in one student textbook to cover procedure and evidence as well as the substantive law. There is a risk that the student may accept the expositions of the former subjects as being as complete as that of the latter, which is not, and hardly can be, the case. "Criminal evidence" cannot be divorced from evidence generally; the device of first dealing with general principles and then with rules peculiar to the criminal law works only moderately successfully: it involves a fissure which students may not bridge. (In your reviewer's examining experience, the combination of the substantive law and evidence in one examination subject has generally made of evidence a Cinderella which never gets to the party.) There is much more to be said for providing a good exposition of institutions and procedure

preliminary to that of the substantive law. Evidence seems better left to stand apart as a subject in its own right, save, of course, that some of its leading principles, and some of its special rules peculiarly applicable to particular offences, such as Receiving, must be fully worked into the fabric of the substantive law and in fact miss their rightful emphasis if relegated elsewhere, however logically proper that may appear to be in theory.

Mr. Turner's transformation of the "general considerations" portion of *Kenny* is excellent, whatever minor criticisms of it may be possible. It was wise to transfer the discussion of the nature of a crime to the end of the book and to omit (except for the use of some of the material in it) the chapter on the purpose of criminal punishment, which, however interesting and salutary it might have been, always seemed more fitted for a textbook on legislative science. The new chapter on the principles of criminal liability will assuredly bear fruit in the future of our criminal law by its insistence on a sound analytical approach to its problems. Historians may want to have their say on the condensed portions giving a historical introduction to the subject, and teachers may find that the later efforts to give a historical background to particular points in the text on the substantive law may now and then overburden or send astray some of the weaker brethren, but at large Mr. Turner has been absolutely right in adopting the principle of a combination of the historical and analytical approaches.

In the chapter on principles of liability the separate treatment of the topic of causation is particularly noteworthy. (Some day perhaps consent may receive similar general treatment in the next chapter.) Students may feel some difficulty about the overlap between the treatment of the position where "the victim intervened against himself" and that where the victim is "guilty of contributory negligence" (*Evans* (1812) or *Grimes* (N.S.W.) might help to make the distinction clearer). It was good to see the section on *mala in se* and *mala prohibita*. On voluntary conduct one expected a reference to *Harrison-Owen* (which in fact is mentioned twice in other contexts). Both in this chapter and later in the treatment of Conspiracy one wonders whether it would not be possible to make some further contribution to the elucidation of the topic of *mens rea* in that offence on the basis of Mr. Turner's own valuable contributions to the subject of *mens rea* generally, drawing a distinction between common law and statutory offences requiring *mens rea* on the one hand and statutory offences involving no *mens rea* on the other, and requiring or dispensing with the requirement of *mens rea* in conspiracy on that basis. On recklessness generally and in malice aforethought, the case of the Manchester Fenians has been found useful by students. In contrasting negligence and neglect, the "wilful neglect" provision of the Children and Young Persons Act is a good modern example. In dealing with *Wheat and Stocks* here and later in the chapter on Bigamy, *Thomas* v. *The King* is worthy of mention. Students seem to find the contrast between *Prince* and *Hibbert* helpful in the discussion of general principles.

In the chapter on Variations in Liability, the suggestion that extreme religious views should be treated as insane delusions will not be acceptable in all quarters. In the treatment of mistake, the sentence about the purposeless operations of veterinary surgeons reads a bit oddly without the footnote which Kenny attached to it. In dealing with insanity and drunkenness experience dictates the introduction of a strong caveat to students that the second and third *McNaghten* rules should not be applied in their entirety to the latter, as students are not uncommonly apt to do. Modern events in relation to the exposition of the subject of superior orders in the British Military Manual would have justified something more than a repetition of what the older editions had to say on it. In dealing with the Criminal Justice Act, 1925, s. 47, it would be better to say that the statutory provision *is* (not *was*) what it is, and in dealing with husband and wife generally some reference to rape is desirable if conspiracy, libel and larceny are to be

mentioned at that point. On the topic of necessity, *Bourne* would seem to merit elevation from a footnote to the text. In the section on infants, note 8 on p. 66 is not complete after the Children Act, 1948. With regard to irresistible impulse, it may be worth noting that those responsible for the Infanticide Act thought they were dealing with a condition which is often of that nature; the note on p. 148 is a trifle misleading in suggesting that it is never so.

In the chapter on Preliminary Crimes, the treatment of Incitements is a trifle thin. On accessories, how far does *Lomas* (1913) support the proposition for which it is generally quoted? On p. 90, would it not be desirable to quote authority for the proposition that if a principal is indicted as an accessory he cannot be convicted? In the next edition, would it not be an improvement to advance the chapter on the classification of crimes to an earlier position?

The improvements which Mr. Turner has effected in the exposition of general principles are equalled by his careful re-editing of the chapters on the definitions of particular crimes. The marks of his learning, care and judgment are ubiquitous.

On Homicides, your reviewer is not so happy as Mr. Turner seems to be in putting child-destruction among them. Students are told repeatedly that the *actus reus* of this offence is the same as in other homicides and thrice that it is not. Have we, in fact, in English law some theory comparable to St. Augustine's distinction between *embryo formatus* and *embryo informatus* which enables us to tell when "one not in being" becomes "a human being"? Could the exposition of what is law for the judge and fact for the jury in relation to provocation be made a trifle clearer—if that is possible—for students? They are bound to ask how the imperative rule in *Holmes* is reconcilable with the sufficiency of provocation in any particular case being stated to be a question for the jury. Mr. Turner's suggestion for a statutory definition of Manslaughter (p. 146) is noteworthy. On homicide generally, it may be useful to emphasise a little more that, provided the child is born alive, whether the injury is pre-natal or post-natal is immaterial (with some doubt about pre-natal neglect in Manslaughter). The opening sentence on Child Destruction on p. 148 reads ambiguously—even after 1929 the offence is not punishable as murder nor as infanticide! On the non-fatal offences, it is a little surprising not to have a reference on the topic of consent to *Donovan* (p. 149). On assault it is an improvement to substitute the word "expectation" for "apprehension"; the ambiguity involved in the latter word is eliminated by the change and by a footnote which emphasises that alarm or fear, though common, is not essential: this seems to have been the position in the old robbery case of *Norden*.

In the Bigamy chapter, the introduction suggests that the offence is limited to having a plurality of wives; "spouses" would be better (p. 170). What the Court of Appeal said in *Baindail* v. *Baindail* about polygamous marriages and the law of Bigamy is ignored on p. 171. The effect of the Adoption Act on the topic of prohibited degrees may be worth noting because of its novelty.

The treatment of Libel is rightly condensed in a textbook on the criminal law because students are bound to deal with the subject more at length in another course, but obscene publications (on which a former D. P. P. has written) may deserve more attention than a footnote reference.

A feature of the chapter on Offences against Property is the trenchant criticism of *Gott* v. *Measures* (1947). The exposition of the whole subject generally is much improved in this edition. But is it technically correct to say that the common law is now superseded by various statutes on Arson—especially in view of the reference to the common law on the next page (p. 194, n. 1.)? In Burglary, it is difficult to believe that the courts today would draw a distinction between a swing-window and one which opens laterally (p. 198): and under constructive breaking a word could be given on

collusive breaking and entering. To give the argument supporting the last sentence on the time element in Burglary (that the prefatory words "in the night" do not govern the word "entered" in section 25 (2) (a)) would help students: and it has sometimes been stressed that the breaking must be with a view to entry. On p. 202 the title "Punishment" is inapt for a paragraph dealing with a series of separate substantive offences. Your reviewer would prefer the section on Housebreaking to follow the lines of sections 26 and 27 of the Larceny Act.

The unintended suggestion on p. 211 that larceny by a trick is a separate offence is corrected in a later footnote, but it would be prudent in the next edition to avoid the possible misapprehension altogether. Similarly students should not be encouraged on p. 225 to fall into the very common error of referring to "the felony of larceny under section 1" of the Act (which creates no offence). Students may not find it easy to be told that "trespass or no trespass is an incidental and not an essential matter in the criminal law of larceny" (p. 226), and, on the other hand, that there can be no larceny without trespass (*ibid.*) and that at common law it still remains necessary that the "owner" has or had such actual possession as would have entitled him to sue for the writ of trespass (p. 231). Owing to the curious heading of paragraph 262, the distinction between things which are not capable of ownership and things which are so capable but which do not have a present owner is likely to be obliterated in the student mind: as the headings and lay-out now run the proposition presented is "The thing must have an owner, *i.e.*, it must be subject to human ownership," which at best is ambiguous and at worst incorrect. The exposition of *Rose* v. *Matt* is shorter than that of some other recent cases and more could be said of it. In fact it has been suggested that it indicates that the word "fraudulently" in the definition of larceny has a meaning—contrary to the view expressed on p. 241. It is good to read Mr. Turner's unsparing attacks on some of the other recent decisions on the law of larceny. On larceny from the person a word might be useful to emphasise the difference between ordinary asportation and that sufficient to satisfy the words "from the person." In Robbery, the statutory provision relating to violence *after* the robbery merits elevation from a footnote to the text. In the same context (on p. 253), the modification of Kenny's footnote which told us that robbery was "six times rarer proportionally than 50 years ago" makes the present note "proportionally rarer than years ago" read curiously vague. (In fact, several of the earlier interesting statistical footnotes have not been brought up to date: several of these data notes have been left as they stood in the 1930's. They should either be omitted or be modernised.) On blackmail, Mr. Winder's article on the historical aspect is useful in explaining much of the subject and certainly merits a footnote reference. (Mr. Denyer's pardon will become a fit subject for a footnote.) On Embezzlement, it is arguable that a little more is desirable on the *Cullum* point on the lines of Blackburn's judgment, but it may be better to leave it, as Mr. Turner does, by simple emphasis that the property must be taken by the accused *in his capacity as a servant.* Although the matter is implied, it perhaps would be wise to emphasise the *mens rea* in embezzlement a little more, on the same lines as in the Fraudulent Conversion chapter. On Fraudulent Conversion, Mr. Turner is very insistent that it is limited to cases where the accused acquires *ownership*: his argument is very persuasive, but here and elsewhere he seems more optimistic than your reviewer in his hopes that the courts will follow these logical views of the exclusive scopes of offences when they are tempted to do otherwise. Would *Bottomley* be useful in driving home the rule that the person delivering the property to the accused may be the person for whom it is entrusted? (On the fiduciary element in this offence, students are bound to ask whether *Cullum* could have been successfully charged with fraudulent conversion!) On False Pretences, is it likely today that the courts would exclude from the scope of

the offence things which are now statutorily larcenable but were not larcenable at common law—*e.g.*, dogs? In para. 342, on the topic of the right obtained in False Pretences, Mr. Turner mentions the difficulties which have arisen on the "fundamental mistake" theory but has omitted Kenny's paragraph on similar difficulties concerning transfer by a person of limited authority: some explanation would be helpful at this point. Students are likely to feel some difficulty about reconciling the last words of doubt on the decision in *Boulton* and the immediately following paragraph on cheques (p. 280). (Note 6 on the same page is a trifle dark and will probably raise student inquiries.) On fact and opinion in the offence of False Pretences, the argument of Graves (of the Consolidation Acts) that *knowledge* excludes *opinion* may be worth mentioning (p. 283.) In the same offence, in view of the language used in *Clucas* the difference between "*the* cause" and "*an effective* cause" is a topic meriting emphasis. (Mr. Turner in fact does adopt the right view.) In para. 350, the penultimate sentence is dark. Is the ambiguity due to the fact that the first "obtained" relates to the accused and the second to the victim? On the possession element in Receiving, *Payne* might well be added to *Pearson*, and the case of prior authorisation added in the text to that of subsequent ratification (p. 290). Your reviewer is not so happy about *Fuschillo* as Mr. Turner appears to be: even if, as has been recently suggested, the defendant's statements could reasonably be taken as a confession, the doubt still remains whether it was a confession that the goods were stolen and that he knew it. On p. 291 is the *Wessel* case rightly put under n. 3—or should it be under n. 4? The evidence rules in this offence, as suggested above, are so important that it is not satisfactory to postpone them to a later position in the book. (And in n. 7 on p. 291 the reference to "*statutory* evidence" seems to refer partly to the *common law* presumption on recent possession.) Trials for receiving go wrong so frequently that a full treatment of the subject in one piece seems desirable.

Even with the appendix on the meaning of "Credit," the treatment of the offence of Obtaining Credit by Fraud in thirteen lines in the main text seems very brief. The formulation of the *actus reus* in the Prevention of Fraud (Investments) Act, 1939, is so educative in its contrast with the meaning of "false pretences" that it is almost worth quoting in a student textbook. Mr. Turner's treatment of *Bassey* in the chapter on Forgery is very well worth special mention. In his argument in favour of regarding the misdemeanour under the Larceny Act, 1916, s. 32, and the felony under the Forgery Act, 1913, s. 7, as exclusive, Mr. Turner says that "it is hardly to be supposed that the legislature intended to create alternative offences *for exactly the same conduct*"; his argument for the exclusion of fraudulent bailees and servants from the scope of the fraudulent conversion provision of the Larceny Act was based on the view that "it would not be reasonable to suppose that *in the same Act* the legislature would offer alternative grades of crime (carrying different maxima of punishment) for one and the same deed."

In the chapter on Treason the decision in *Joyce* appears to escape lightly, but in fact there seems to a mighty pass made at it in an earlier footnote on p. 317! Under misprision of felony (p. 323, n. 6), is the date well chosen in the statement that "for many years *before 1948* prosecutions for it had been unknown"? Surely there were earlier instances in the preceding eighteen years or so. Mr. Turner deals very faithfully with *Manley* and the misdemeanour of Public Mischief, but the principle of *nulla poena* is such a fundamental one that it might be desirable to say even more on the subject. On motoring offences, the *Whittall* v. *Kirby* business is discreetly ensconced in a footnote. In the Conspiracy chapter the paragraph on p. 340 based on *Cooper and Compton* (1947) is likely to confound students. It is doubtful whether the case deserves a paragraph to itself. If the jury had refused to believe the evidence then it can hardly be said that in law it showed that the prisoners had completed their agreed purpose.

In the Evidence section, if the Evidence Act of 1938 requires two paragraphs in a textbook on the criminal law, it would be prudent to strengthen the warning that the provisions quoted apply only in the civil law. On Procedure, the descriptions of some of the courts (and particularly of the Central Criminal Court and Juvenile Courts) is brief; the note on p. 454 about the legal qualification of chairman of County Quarter Sessions is correct, but hardly adequate to describe the situation today; the statement on p. 479 that "all the proceedings in the magistrates' court must be strictly regular" is very abrupt without some explanation; an expansion of the note on *Wilmot* on p. 491 would be helpful as the reconciliation of the rules given in the text will probably puzzle the student somewhat; on the office and functions of the Director of Public Prosecutions, the present Director has spoken (p. 495); on p. 520, note 3, which says that the C.C.A. will quash convictions if the verdicts be unreasonable, the addition, "cases merely weak are not retried," reads very ambiguously; without some description of them, students may not understand the references to attendance centres.

The work is remarkably clear of slips but a few new ones have crept in and some old ones have not been corrected. *Stone* is wrongly dated in the index and on p. 130; on p. 149 a compound sentence has been broken by a full-stop; the Police Pensions Act, 1948, seems to have been overlooked (p. 295); the Judges' Rules were laid down in 1912 (p. 430); costs in civil proceedings against the Crown can now be supported by reference to the Crown Proceedings Act, 1947 (p. 515). Additionally, the form of citation of cases is not uniform throughout the book: a substantial number are not quoted by name but merely by reference to the reports and some of these place-references are in the text and some in the footnotes without apparent reason for the distinction. Similarly when the cases are named some find themselves in the text and not in the footnotes presumably because they happened to be placed there in some previous edition. But these are minor blemishes; the marvel is that such an onerous task of re-editing has been done with such care. The printing also is good. (Figures have disappeared in footnotes on pp. 412 and 492).

The right and deserved conclusion to any review of this work is an expression of profound gratitude to Mr. Turner for the discharge of a very difficult, if pious, task with such exemplary ability and judgment. Generations of students and teachers will be the beneficiaries of his labours.

D. R. S. D.

A Textbook of Jurisprudence. Second Edition. By G. W. Paton. [Geoffrey Cumberlege, Oxford University Press. 1951. xiii and 527 pp. 30s.]

The first edition of Paton's *Textbook of Jurisprudence* was reviewed in this Journal by Professor R. H. Graveson (10 M.L.R. at p. 80), who, with his usual sound judgment, observed that this book would become for many students *the* textbook of Jurisprudence. So it has proved. The second edition is, however, even better than the first, and the learned author has turned helpful criticism to good advantage. New sections have been added inter alia on *Bentham*, *Comparative Law*, *Post-Classical Law*, *Custom*, and *Statute Law*. Book V in the first edition (*Analysis of Law on the Basis of Interests*), has been re-written and transferred to Book II, which is concerned with the purpose of law. This was a wise and successful decision, and rearrangement of the work into its present form of six books has increased its cohesion and lucidity. The book contains illustrations from and references to French, German, Chinese, American and Scottish Law inter alia, and this greatly assists the reader to evaluate English solutions to general legal

problems. Paton's interest in Comparative Law and his Antipodean detachment have enabled him to present English Jurisprudence in perspective to an unusual degree.

In discussing the development of law by fictions, the author considers the limits of the Scottish doctrine of fictitious death which enables the successful pursuer in a divorce action to obtain legal rights out of the divorced spouse's estate. The time has come in Scotland for making provision for pursuers by an arrangement more suitable to an age when few people own much capital but many have substantial salaries or wages. By the time the third edition of "Paton" appears, one may anticipate that the fiction should no longer operate.

Since the learned author has not infrequently referred to Scottish cases such as *Selsdon* v. *Selsdon* 1934 S.C. (H.L.) 24 (in the example just quoted), *Donoghue* v. *Stevenson* 1932 S.C. (H.L.) 31, and *McMullen* v. *Lochgelly Iron & Coal Company* 1933 S.C. (H.L.) 64, it may be legitimate to suggest that in future editions the official Scottish references should be supplied. Professor Paton has given only the Times Law Report reference for *Selsdon*, and only the Appeal Cases reference for the other two cases. Accordingly, the reader might easily fail to realise that *Donoghue* and *McMullen* were in fact Scottish cases decided on relevancy (*anglice demurrer*). The custom adopted by learned writers on English Common Law whereby they refer to Scottish cases in the House of Lords by English citations sometimes leads them and their readers to doubtful conclusions. Despite the concession by counsel in *Donoghue* and dicta from their Lordships in both *McMullen* and *Donoghue*, the reviewer has still to be convinced that the Scottish law of Quasi-Delict is on all fours with the English tort of Negligence. More surprising, however, is Professor Paton's choice of *Donoghue* v. *Stevenson* to illustrate the English doctrine of precedent. Strangely enough, Stone and other leading jurists have done the same. It has yet to be established that a decision by the House of Lords in a Scottish appeal is strictly binding on an English court. (On this, see Glanville Williams 6 M.L.R. 80). *Non constat* moreover, that the doctrines of judicial precedent are the same in Scottish and English law. Indeed, the reviewer is strongly of opinion that they are not. Though the point is probably not now arguable in practice, it may be observed that the *London Street Tramways Case* doctrine need not necessarily apply to Scottish appeals. Lord Eldon alone seems to have directed his mind to the question whether the House of Lords is free to follow a different practice in Scottish appeals than that which it follows in English appeals. Moreover, the Court of Session is not completely helpless in the grasp of precedent (p. 165) unless the precedent is that of the House of Lords in a civil action. A special session of the court may be convened to review conflicting statements of a legal principle formulated in previous decisions although there is clear opportunity to distinguish on the facts. Further, there have been indications that a doctrine of desuetude is recognised in Scottish case law (see *Beith's Trustees*, 1950 S.C. 66).

A further point on precedent may be made. The learned author comments (p. 159) that "In England the courts are imperatively bound by decisions of higher courts in the same hierarchy." There is scope for fuller consideration of the variation of doctrines of precedent in the various hierarchies of courts within the same system. Recently, though precedent in English civil courts has become more rigid, a more liberal approach has been adopted by a full Court of Criminal Appeal in England—*R.* v. *Taylor* (1950) 2 K.B. 368. It is not, however, in every case that the consequences of a conviction in criminal proceedings will be more disastrous than those of losing a civil action, and the Lord Chief Justice's argument that greater flexibility is expedient *in favorem libertatis* may not necessarily be conclusive of the whole matter. At p. 166, the learned author suggests that there are some branches of the law in England which, because of rapid development, cannot pay

too much attention to old precedents. This view was certainly taken by Denning J. (as he then was) as applicable to pensions appeals—*Minister of Pensions* v. *Higham* (1948) 2 K.B. 153.

At p. 203 Professor Paton refers to the debt which the French Code owed to the jurists Domat and Pothier in fusing the Roman rules of the South and the Germanic customs of the North. Then considering the English system he asks "Would the doctrine of binding precedent have become established had the textbook enjoyed greater prestige?" An enquiry into Roman-Dutch law and Scots law might assist in solving this problem, since the authority of the Institutional Writers is an outstanding feature of these systems. The difficulty, of course, is that the institute has to be supplemented by case law, in time gets out of date, and thus a new institute has been required from time to time to digest the developments effected by case law. Lee in the present century and Kaimes in the eighteenth century have both referred to the difficulties involved in referring to authoritative writings written for a different age, but undoubtedly in those countries which classify institutional writings as a source of law, the basis of principle which they supply has mitigated the rigidity of case law. However, the natural consummation of these authoritative treatises in the modern world is presumably, as in France, the eventual promulgation of a Code.

At p. 286 Paton observes that "No injustice is done in imposing a light fine even on a person who is morally innocent." This, it is submitted, should be qualified. In those systems which have a special designation for infringements of the law involving no moral turpitude, the learned author's statement may be true enough. Where, however, the same *nomen juris* "misdemeanour" or "offence" covers both acts of turpitude and acts morally innocent, respect for law is probably sapped by the use of criminal procedure to regulate social conduct. A clear frontier between *mala in se* and *mala quia prohibita* is not so easy to define in practice. The enforcement of price controls is not purely a modern problem, as witness the Code of Zeno and the Lex Julia de Annona. There may or may not be moral turpitude on the part of a man who evades controls. On the question of insanity in Criminal Law (p. 296) it was rather surprising to note that Professor Paton still envisages a possible broadening of the *McNaghten* Rules through the doctrine of irresistible impulse. While this doctrine might have assisted progressive development in the past, is it not now out of favour even with the medical experts? On the associated topic of the fitness of juries to determine questions of insanity, the author's remarks are much in point. Clearly, if insanity is to be left as a jury question, the law and medical evidence must be presented in a way which a jury can understand. In any event they will ignore technicality.

There are a few small points which might be given attention in a subsequent edition. There is an obvious slip in setting up the type of the third and fourth paragraphs on p. 86, and on p. 361 in the new section on Sale and Hire Purchase there is a confusion between "buyer" and "seller" in the third paragraph. In discussing the doctrine of desuetude (p. 146) a more confident statement of the law would be justified than that ventured in the final sentence of p. 39. The references to Daube's *Biblical Law* (pp. 37 and 41) might justify an addition to the references on p. 50. In his Preface to the second edition, the learned author observes that Judge Frank has convinced him that he had not been altogether fair to the realists in the earlier version. This olive branch is somewhat withered by the retention of the rather sarcastic footnote 50 on p. 19.

Paton's *Textbook on Jurisprudence* has already proved itself. It remains only to say that the second edition will prove even more valuable than the original, and that its popularity will not be confined to the countries of the English common law. Since many able reviews will be written by those who expound the law of England, the reviewer makes no apology for assessing the

book somewhat from the standpoint of one who "sits on the fence" between the common and the civil law. In chapter 10, the learned author has discussed the influence which a textbook may have on the development of the law. His own work might well be quoted as an example.

T. B. Smith.

The Action on the Case: An Historical Survey . . . up to the Year 1700. By A. K. Kiralfy. [London: Sweet & Maxwell. 1951. xxxii and 248 pp. 50s.]

In reviewing a work of this sort, it is especially necessary to insist at the outset that it has considerable merits, that the author has laboured long upon very difficult material, most of it in manuscript, that he has devoted much thought to what he has found, and that he has made suggestions some of which deserve serious consideration. In short, he has deserved well of the learned world, and anyone who writes about case in the future will have to consult this book.

Such a reader will have a heavy task before him, unfortunately. The book contains no footnotes, or rather, the footnotes are printed continuously with the text and merely enclosed in brackets. No more effective way could be devised to render a book unreadable than to secrete the author's thought in the interstices of a crazy-paving of citations. The citations are fortunately in the conventional form to which lawyers are accustomed; but historians too are sticklers for propriety, and will find it hard to forgive Dr. Kiralfy for ignoring it so pointedly. Scores of times he uses the Rolls Series of Year Books and attributes them to a mythical "Rolls Society"; he has endowed the Selden Society with a non-existent "Select Pleas Series." He uses only one passage from Bracton, but four times out of five the reference is wrong. A most valuable appendix of hitherto unprinted cases, which will be consulted for many years to come, bursts into large capitals every few lines so that he who runs may read (although he neglects the rest at his peril). Misreadings are happily rare (the only one obscuring the sense is on p. 217, line 11, from the foot where "conficti" must be corrected to "consuti," and in the next line read "venerabilibus"). There is a most impressive list of plea rolls consulted, but it does not say where in the book use has been made of them; the law terms are put out of order since the author thinks wrong dates more convenient. To speak of "Titus MSS" and to describe a Royal MS as "other" suggests a very slight acquaintance with the British Museum. Although the author has amassed so much evidence against himself, it is clear that he really has seen and perused these books and manuscripts, even if he refuses to handle them as a historian would.

It goes deeper than that, however, for these vagaries are symptoms of a refusal to think historically. Thus on p. 19 an argument is based on the position of commas in various editions of Bracton and Fleta without realising that commas are the work of modern editors and do not appear in the manuscripts. Further, Dr. Kiralfy uses only half of Bracton's short sentence on which to base his submission (p. 20) "that the action on the case is to be traced to the *breve formatum super certis casibus* and not to the *breve magistrale.*" The second half makes all this untenable, for Bracton says that *brevia formata* can in no circumstances be changed without the consent of all the realm. How then can such writs be the parent of the Protean case? And (if it is to Bracton that we must look) how can we exclude the *brevia magistralia* which Bracton says, "are often varied in accordance with varied cases, facts and complaints?"

A curious example showing that the author is not looking for historical facts, but for legal propositions, appears on p. 22. From Bracton he has been led to the conclusion that "the writ on the case antedates the statute of 1285." This is of vital importance, if true, and it *is* true, because

Hussey C.J. said so—in 1482! Hussey is, of course, weighty authority for a proposition of law under Henry VII, but none whatever for historical facts two centuries earlier. A historian, faced with this problem, would immediately start looking through such collections of cases before 1285 as have been printed to see if he can find anything like actions on the case. He will not be disappointed, for three such cases, dated 1265, appear on two successive pages of *Abbreviatio Placitorum*, 156–7, and doubtless search would uncover more.

Although Dr. Kiralfy formally abjures the statute *in consimili casu* (p. 25) it is with reluctance, and the statute still haunts his thesis. Surely the time has come when it is no longer possible to believe all the theories simultaneously. If progress is to be made, false clues must be thrown out; the statute has gone, and the Provisions of Oxford must go, and with them Bracton, f. 413b. To be discarded also are the painful lists of expressions "trespass on the case," "special trespass," "trespass on the special case," "writ on his case" and the rest, leading to such conclusions as (p. 95) "it is submitted that the action on the Case is in all cases technically a form of Trespass on the Case." As late as 1612, Bulstrode calls them all "trespass," *tout court*. It must be recognised that Dr. Kiralfy has been singularly unlucky in publishing his book too soon to be able to use Mr. Fifoot's lively contribution, and still more so in not having the use of Turner's *Brevia Placitata* which makes many of his weary pages of speculation about writs *de cursu* obsolete. Indeed, Dunham's still more recent *Casus Placitorum*, lxxv, No. 1, contains a most intriguing example of case dated as early as 1254.

Although the author refuses to abandon any of the ancient argumentations, he has nevertheless provided some valuable new contributions which can replace the old. Thus he gives striking material from local courts, and especially London courts, for the parallel development of case in those jurisdictions (p. 8). This matter is happily carried further in Appendix C—until the county court is reached. Here the author once again is frightened away from historical inquiry by the dogma of judicial infallibility: "English county custom became stereotyped in 1189" (p. 235). This learned lunacy is indeed the law, and so the author is in a dilemma like Galileo's; modern dogma asserts that the county could not have entertained actions on the case, although Dr. Kiralfy knows very well that it did. He might well have exclaimed *Eppur si muove*! Instead, he resolves to call actions on the case "general trespass" if they occur in the county—but since he found a decision (happily unpublished) of 1635 holding that actions on the case existed from before legal memory, dogma is saved, and after that date it is possible to speak of actions on the case in the county.

The core of the book consists of separate studies of nuisance, deceit, slander, innkeepers, carriers and kindred topics. All the principal cases are discussed, Year Book cases have been found on the plea rolls (notably *Doige's Case*, which the Year Book leaves undecided, but which is enrolled with judgment for the plaintiff—unluckily the author never gets the Year Book reference right), and lists of early cases from the rolls are given. All this makes the book an indispensable instrument for further research. The author expressly excludes *indebitatus assumpsit*, although he in fact gives us chapters on *Slade's Case* and on consideration. There is an Index which the printer, in spite of spacing it out, could not extend to much more than two whole pages.

T. F. T. Plucknett.

Corporate Trustees. By D. R. Marsh. [London: Europa Publications, Ltd. 1952. xiv and 318 pp. 25s.]

Those who read an article by the author of this book which recently appeared in *The Cambridge Journal*[1] will approach his full-length work with eager

[1] (1951) Vol. IV, p. 451.

expectation, and they will not be disappointed. Written by a member of the trustee department of one of the banks as a result of a grant from the Houblon-Norman Fund, it is an unusual work of great interest dealing with one of the most fascinating of recent developments in the relationship between trust and corporation. In the past the trust concept has been invoked both in the development of the law of incorporated companies (notably in connection with the position of directors) and to enable a joint stock company to function with most of the advantages of corporate personality without a formal grant of incorporation which, until 1844, was a rare and expensive luxury. More recently the corporation has returned the compliment by facilitating the working of the trust by providing a corporate trustee with perpetual succession, financial stability and professional expertise.

Mr. Marsh's first five chapters are largely devoted to a treatment of this historical development. These are exceptionally well done. The author has not only made full use of recent published material, but has also undertaken considerable original research into the early efforts, for example by the atrophying South Sea Company, to introduce and popularise the corporate trustee, efforts which eventually led to the establishment of the Public Trustee and the trustee departments of the banks and insurance companies. The particular virtue of his treatment is that he is not content merely to describe what happened, but seeks throughout to explain why and to point the lessons. For example, he rightly emphasises that the law's refusal, until 1889, to permit joint tenancies between individuals and corporations, and, until 1920, to allow the direct grant of probate or letters of administration to corporations, resulted in numerous anomalies and wasteful efforts to surmount them, which illustrate "the friction that may arise when legal theories lose touch with changing social facts" (p. 99). On one point it is possible to quarrel with Mr. Marsh. He says (at p. 12) that there seems no escape from regarding the directors of a company in the same light as agents of human individuals; if, however, he looks at *Lennards Carrying Co.* v. *Asiatic Petroleum* [1915] A.C. 705, and the cases on the criminal liability of companies, he will find that the courts have, in fact, found a means of escape.

In Chapter VI Mr. Marsh deals very fairly with the hostility of the legal profession towards trust corporations and has no difficulty in showing that it was largely unfounded and is beginning to die. In these circumstances it is particularly unfortunate that he should, elsewhere, have gone out of his way to exacerbate the legal profession by unjustified digs at their competence. Mr. Marsh is clearly an enthusiast, and he can be forgiven for praising the work of the bank's trustee departments even though the reader may feel that his praise is sometimes exaggerated and would be more appropriate to a newspaper advertisement than a scholarly work (see p. 204). But it is inexcusable to revive old quarrels that are better forgotten by constantly contrasting the alleged skill and thoroughness of the banks with the alleged incompetence and apathy of solicitors. Nobody contends that every solicitor is a good one, but it is grossly unfair to suggest that the average solicitor is unaware of the advisability, where the beneficiaries are resident abroad, of investing in stocks on which the interest is paid without deduction of British income tax and which are exempt from British death duties (pp. 228–9), that he cannot draft a will without obscurities (pp. 254–5, and 265), that he does not appreciate the need to exclude technical rules regarding apportionment between income and capital (pp. 255–6), or that he needs any help in drafting a wide investment clause (p. 226). Mr. Marsh may well have had unhappy experiences with solicitors—but so have solicitors with trustee departments. For example, the reviewer well remembers one case in which the bank, failing to understand the, admittedly complicated, rules relating to abatement of legacies and annuities when the estate is insufficient to pay both in full, paid an annuitant less than half the sum to which he was legally entitled, and made a second mistake in calculation even after the matter had been drawn to their

attention and they had taken counsel's opinion. It is incidents like this which make one doubt the truth of Mr. Marsh's proud boast (see p. 190 and elsewhere) that "no trust beneficiary has ever lost a penny through . . . mistakes of corporate trustees." It is true that the beneficiary did not, in the end, lose a penny in this particular case, but the mistake would never have been discovered if a friend had not persuaded the reluctant annuitant to visit a solicitor for the first time in his life.

But mutual recriminations are best avoided. As Mr. Marsh says, "a way of live and let live has been hammered out in the last forty years." It is a major flaw in this otherwise excellent book that it seems determined to disturb the *modus vivendi*.

Chapter VII deals with charges and profits and contains an interesting and critical discussion of the methods of charging and a plea for a more scientific method of assessment. In a comparison (at pp. 148 *et seq.*) of the charges of the Public Trustee and the trustee companies, Mr. Marsh has no difficulty in proving that the companies are nearly always considerably cheaper. He seems to be on less firm ground, however, when he seeks to prove that they are also cheaper than a private administration. He takes certain selected cases and shows that in these the total costs would have been greater had there been private administrators who left everything to the solicitors. This, however, is only a valid argument on the assumption that the corporate trustee does all it can and only leaves the purely legal work to the solicitor. Mr. Marsh admits that practice varies widely in this respect, and that "in some instances the corporate executor feels it is the wiser course to leave things to the solicitor as though it were a private individual executor" (p. 253). When this is done it can hardly be doubted that the costs of administration by a corporation are considerably greater, even if it makes a reduction of its normal fee, as it sometimes does. Here again, Mr. Marsh weakens his case by protesting too much.

Chapter VIII contains a valuable description of Office Organisation and Staff. Mr. Marsh is probably right in attributing the vast increase in the trust companies' businesses to a policy of decentralisation introduced during the last 15 years. Whether he is right in criticising the Public Trustee for not following suit is more questionable. Doubtless decentralisation has enabled more business to be attracted and is responsible for the fact that the banks have outstripped the Public Trustee, but it does not necessarily make for increased efficiency which the Public Trustee has rightly always made his primary aim. This chapter also contains an interesting criticism (almost a *cri de coeur*) of the parsimonious wages policy adopted by the banks towards their trust officers.

The only other chapter (X) to which special attention need be drawn is that dealing with Investment Policy. Here, as elsewhere, Mr. Marsh, draws largely on comparative material and makes a strong case for "common-fund" investment of trust funds of small estates such as is permissible in New Zealand and the U.S.A.

The whole book, however, can be read with interest and instruction as a very complete account of the development and practical working of a trustee department. The emphasis is on the work of the banks and too little is said about trustees for debenture-holders—a branch of trustee work of which the banks have tended to fight shy since the *Dorman Long Case* [1934] 1 Ch. 635, revealed the dangers of being both banker and trustee. On the other hand there is a good, if brief, account of Unit Trusts (see especially pp. 269 *et seq.*)—fascinating institutions which have received too little attention in legal literature.

The publishers, newcomers in this particular field, are to be congratulated on an excellent piece of book production at (*mirabile dictu*) a very reasonable price.

L. C. B. G.

THE PRINCIPLES OF INCOME TAXATION. By J. P. HANNAN and A. FARNSWORTH, LL.D., PH.D. [London : Stevens & Sons, Ltd. 1952. lvi and 582 pp. £3 3s.]

THIS book is an adaptation for English practitioners of a work originally published in Australia by Dr. Hannan. Its aim is to deduce from the decisions of the courts those basic principles which determine the nature of taxable income and the cost of earning it. The adaptation has been carried out by Dr. Farnsworth with a care and learning which cannot be too highly praised, and it now contains a digest of nearly a thousand tax cases decided both in Britain and in the Commonwealth.

Its main fault, it is submitted, is inherent in the basic conception of its original author that an adequate practical guide can be furnished solely by case law and by ignoring statutes. This, surely, is an example of the heresy which by now we should have outgrown, that only case law can be dignified by the word "principles" and that statutes must be regarded as an unfortunate rash which it is politer and more expedient to ignore. It is, of course, true that the Income Tax Acts have never defined "income" and that it would be perfectly possible to write a thesis on the Nature of Income without reference to any statute. But this book is not a work of abstract jurisprudence but a severely practical work restricted to tax questions which it investigates in some detail, and disregard of the relevant statutory provisions sometimes gives the impression that Hamlet is being played without the Prince of Denmark.

Dr. Farnsworth has obviously been alive to the likelihood of this criticism and has done his best to meet it in advance. References to the Income Tax Act have been added "where they seem to exemplify" common law principles, and where they contradict these principles a warning to this effect has been inserted. But even Dr. Farnsworth seems unwilling to recognise the possibility that the legislature may enunciate a principle as well as a judge, although a reader of many of his chapters will be left with the impression that case-law has often been conspicuously unsuccessful in producing any coherent principle at all. This over-conservative approach appears to the reviewer to have seriously diminished the practical value of the book, great though its value undoubtedly is.

In a work of this size on a topic of such complexity every reader will find something with which to argue. If the present reviewer may ride his own particular hobby horse, he would single out for comment the chapter (6) on Dividends and Bonus Shares. In dealing with the anomalous rule that a recipient of a dividend paid by a British company is only assessable to surtax thereon if the dividend is paid out of profits chargeable to tax in the hands of the company, the learned authors explain it as a necessary consequence of the operation of "taxation at source." It is respectfully submitted that this is no explanation at all. Even if the company cannot deduct tax unless the dividend is paid out of a fund chargeable to tax in its hands, there is no reason why it should follow that the dividend cannot be regarded as taxable in the hands of the recipient, as it would be if the company was not British: *I. R.* v. *Trustees of Reid* [1949] A.C. 361. No clear reasons for the contrary rule can be deduced from *Gimson* v. *I. R.* [1930] 2 K.B. 246, in which it was laid down by Rowlatt J., or from *Neumann* v. *I. R.* [1934] A.C. 215, in which *Gimson* was approved by the H. L. In fact, the rule seems to be the one remaining relic of the now exploded idea that a company pays tax as an agent for its members so that the test of what is taxable income must be the same in both cases. And incidentally it is surely misleading to cite *Dixon* v. *I. R.* (1937)—not (1931) as quoted at p. 72—21 Tax Cas. 365 under the heading "Distribution of Capital Assets"; the whole basis of the decision was that the fund distributed was income in the

hands of the company, and only on this basis is it "clearly in line with principles (sic) already stated."

This same chapter also furnishes an example of the unsatisfactory result of the somewhat perfunctory treatment of statute law to which reference has already been made. At p. 73, *Drown* v. *British Gaumont Picture Corpn.* is quoted as authority for the proposition that Share Premiums may be distributed by way of dividend, without reference to the fact that this has been overruled by the Companies Act, 1948, s. 56. On the following page this section is quoted, but the reader is left to deduce that *Drown's Case* is no longer law.

These criticisms must not be taken to suggest that this book will not be of immense value to tax advisers. On the contrary, it will be a most useful work of reference and many of the chapters could scarcely be bettered. Chapters 18–20, dealing with the tax problems arising out of various types of compensation payments, are likely to prove especially valuable.

L. C. B. G.

CANADIAN CONSTITUTIONAL LAW. By BORA LASKIN, Professor of Law in the University of Toronto. [Toronto : The Carswell Co., Ltd. 1951. xvii and 676 pp.]

PROFESSOR Laskin's book is not a comprehensive treatise on the constitutional law of Canada; it is a book of cases and materials on the distribution of legislative powers between the Parliament of Canada and the provincial legislatures. But when he describes it, in his Preface, as a "collection of cases interspersed with text and notes" he is too modest. It incorporates all the features that are associated with the best American casebooks: judicious selection and arrangement of basic materials, ample references to periodical literature, and, above all, suggestive and illuminating editorial comment. It is, in fact, a work of high quality and a notable contribution to legal literature. The Canadian students for whose benefit the volume was compiled are most fortunate. One who has prepared a course on Canadian constitutional law for post-graduate students in the University of London cannot but lament the fact that it could not have been published two years earlier.

It may seem captious to express regret that the scope of this excellent—and substantial—volume was not wider. But the fact is that this is the first general work to have been published on Canadian constitutional law for over 30 years. There have been admirable books by Kennedy, Dawson and Clokie on the constitutional history and system of government of Canada, but no work that has been devoted primarily to an exposition of its constitutional law. Yet every volume of the *Canadian Bar Review* and the *University of Toronto Law Journal* contains articles and notes on constitutional law; and in 1939 and 1940 there were published the O'Connor Report to the Senate on the British North America Act, and the massive Report of the Royal Commission on Dominion-Provincial Relations. Perhaps the main reason for the absence of treatises and textbooks is to be found in the character of the O'Connor Report and the great majority of articles by academic lawyers, which have been highly critical of the manner in which the Constitution has been interpreted by the courts. The complaint that the principles of judicial interpretation have generally failed to give effect either to the letter or to the spirit of the British North America Acts seems to be well-founded. It is plain that the 1867 Act was intended to form the framework of a centralised federal system. The Parliament of Canada was given a general power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects expressly assigned to the Provinces. As illustrations of this general power conferred upon the Canadian Parliament there were enumerated 29 heads of legislative power.

But these enumerations were not intended to be exhaustive, and the residuum of legislative power was to belong to the Parliament of Canada, for the Provinces were to be strictly confined to their own enumerated heads of legislative power. The primacy of the Centre is further emphasised in that the Governor-General (on the advice of his Ministers) has power to appoint and dismiss the Lieutenant-Governors of Provinces and to disallow provincial legislation. Nevertheless, the Judicial Committee of the Privy Council showed a persistent solicitude for provincial "autonomy," and in order to safeguard the Provinces from "encroachments" by the Dominion Parliament it evolved principles of interpretation that enhanced the legislative competence of the Provinces to the detriment of the Centre. The general power to legislate for the peace, order and good government of Canada was first "strictly confined to such matters as are unquestionably of Canadian interest and importance"; later Lord Haldane attempted to restrict it "to cases arising out of some extraordinary peril to the life of Canada." It was reduced to the status of a supplementary power, to be relied on in support of Dominion legislation in times of emergency; otherwise the legislative powers of the Dominion were limited almost exclusively to the enumerated heads of power, which had been intended to be merely illustrative of its "general" power. Moreover, the enumerated heads of power were themselves restrictively construed. Thus, the ambit of the Dominion trade and commerce power was held to be a narrow one; on the other hand, the provincial property and civil rights power came to embrace a vast range of subject-matters of legislation. Between the wars, Acts of the Dominion Parliament providing for conciliation in labour disputes, the regulation of insurance, marketing schemes, investigation of combines, the establishment of minimum wages and maximum hours of labour and a number of other matters were held to be invalid on the ground that their subject-matter fell exclusively within provincial competence as legislation in relation to property and civil rights in the Provinces.

In the result, the capacity of the Parliament and Government of Canada to regulate economic activity, to make provision for social welfare, and even to secure the implementation of international obligations, was seriously impaired. Surveying the work of the Judicial Committee of the Privy Council, Mr. Justice MacDonald, the distinguished Canadian constitutional lawyer, recently wrote that "our Constitution, as it now exists in a text encrusted with decisions, is not what we sought or what the Imperial Parliament provided for us" ((1951) 29 Can. Bar Rev. at 1031). While purporting to interpret the Constitution like a statute, the Judicial Committee contrived to cast a protective mantle over the Provinces. However, two observations are permissible. If the Judicial Committee assumed the role of judicial statesmen, they did at least mould a Constitution that meets with the approval of a great number of Canadians; the most important Provinces will not consider relinquishing to the Centre any significant segment of the sphere of legislative competence that has been bestowed on them by the grace of the courts. Indeed, provincial particularism has hitherto prevented any agreement within Canada upon the adoption of a procedure whereby the entire Constitution could be amended without reference to the United Kingdom Parliament. Secondly, it is possible that the decisions of the Judicial Committee in the *Canada Temperance Federation Case* [1946] A.C. 193, and the Canadian Supreme Court in *Johannesson* v. *West St. Paul* [1952] S.C.R. 292, may presage a revival of the "general" power of the Canadian Parliament and a movement back towards the intentions of the framers of the British North America Acts.

It is to be hoped that Professor Laskin's book will be made available by the leading English law libraries. Lawyers who dip into it will find a fascinating record of the response of the Judiciary to a challenge that is not offered by any aspect of English law. Federalism is legalism; and where

constitutional development is seen to proceed mainly by judicial review of legislation there is no place for pretences that the judges do nothing but declare the law. That the experience of Canada in the matter of constitutional interpretation should not have been a very happy one is hardly surprising in view of the unfamiliarity of English judges with the duty that they were required to discharge. If one may say so without disrespect, two of the wisest decisions ever rendered by the Judicial Committee were those in which it upheld the validity of Canadian legislation abolishing the right of appeal.

S. A. de Smith.

The Constitutional Law of Great Britain and the Commonwealth. By O. Hood Phillips, M.A., B.C.L., Dean of the Faculty of Law and Barber Professor of Jurisprudence in the University of Birmingham, assisted by G. Ellenbogen, M.A., of Gray's Inn and the Northern Circuit, Barrister-at-Law. [London: Sweet & Maxwell. 1952. xliv and 826 pp. 42s. net.]

Leading Cases in Constitutional Law. By O. Hood Phillips, M.A., B.C.L., Dean of the Faculty of Law and Barber Professor of Jurisprudence in the University of Birmingham. [London: Sweet & Maxwell. 1952. xxi and 469 pp. 35s. net.]

Shortly after the War, Professor Hood Phillips placed students of constitutional law, and their teachers, heavily in his debt. His admirable new editions of Chalmers and Asquith's textbook and Thomas and Bellot's casebook resuscitated useful works that were in danger of passing into oblivion. A comparison of the present edition of the textbook with its contents before the War shows that it has been almost entirely re-written. Very properly, both textbook and casebook now appear under Professor Hood Phillips' name.

The main characteristics of the textbook are its wealth of detail, full documentation (particularly in the matter of references to writings of academic lawyers), lucidity and accuracy. It is indeed a quite extraordinarily accurate piece of work. The field of constitutional law is so wide that a few lapses are pardonable, but Professor Hood Phillips and his collaborator have no need to crave the reader's indulgence. The quality of accuracy is especially noteworthy in the section on the Commonwealth. This was probably the most exacting part of the book to write, and it includes such notoriously difficult topics as the judicial interpretation of the British North America Acts; but if there are any mistakes in it they have eluded the reviewer.

The glaring weakness of the previous edition was the sketchy account of administrative law. This part of the work has been greatly expanded, and the new material leaves little to be desired, though the chapter on public corporations is rather thin and there is no substantial ground for saying (p. 343) that recent cases have shown a tendency to narrow the scope of certiorari. An unfortunate result of the necessary inclusion of new material has been an increase in the size of the book to over 800 pages, in spite of the deletion of chapters on the history of the courts. It is not easy to see how the problem of size can be solved without impairing the value of the work, for one would wish to have still more space devoted to some of the more controversial issues, where the author is sometimes content to mention the views of others without expounding his own. Perhaps the answer may lie in rewriting sections in which an undue amount of space appears to have been devoted to accounts of individual cases: see, *e.g.*, pp. 357–60, 551–5, 645–7.

Hood Phillips can be unreservedly recommended to students as a textbook, and to others as a valuable work of reference.

The casebook, which underwent drastic changes in its previous edition, has been improved by the introduction of some leading cases on Commonwealth relations and the addition of six cases on administrative law. Room was found for the newcomers by the ejection of ten less important cases. The editorial notes in this edition are brief; in a number of instances there is a bare reference to the relevant pages of the textbook. This may diminish the value of the casebook for those students who do not buy the textbook as well; but to protest on their behalf would be both churlish and naïve.

S. A. de Smith.

Cases on Administrative Law. By K. C. Davis. [Boston: Little, Brown & Co. xxv and 1031 pp. 1951. $8.50.]

This volume is another of those massive compilations which play so important a role in American law teaching. The author or editor has collected his materials from many sources including cases, articles, books, hearings and minutes of evidence. Notes and problems follow many of the excerpts. Professor Davis is well known to administrative lawyers in this country by his many learned articles. These formed the basis of a textbook which he has recently had published and the casebook is designed as a companion volume. This is not the usual practice in American law schools where textbooks do not hold that central place allotted to them in English law teaching. Professor Davis comments on this "parallel organisation of the two books." He writes: "It helps in designing the casebook exclusively for instruction of classes of law students, it relieves the casebook of such incidental functions as providing references for further study or research, and it takes care of corners that the casebook must leave unfilled. But the effects of the parallel text are by no means limited to those relatively superficial ones. The very heart of the educational process becomes involved. If the primary need of law students is not a mere knowledge of law but is ability to grapple with problems—and this book is constructed on that premise—then special precaution must be taken to prevent the text from destroying the process of problem solving. . . . Solutions the student assumes to be authoritative may easily become the enemy of sound education."

This is an interesting comment. Those of us who have never been to an American law school learn from those who have that one effect of the casebook method of teaching is to produce a student well able to reason for himself, not afraid to speak in the public lecture room, and ready to question the validity of authoritative pronouncements. Professor Davis is immediately fearful lest his textbook should impair these qualities. He insists on the need for "concentrating upon problems along the frontier of the subject where authoritative answers are not to be found." Clearly the grappling with such problems must follow the learning of many rules of law. All this takes time and the American short-cut is the casebook. The weakness of this method therefore seems to be that the student consults cases in the collected volumes of law reports or other materials in their own context far less frequently than the student in this country. The weakness of our system is that we do not make time (some would say, *have* time) to deal with the problems which lie behind the judicial answers in particular cases. This is not the place to elaborate a possible synthesis.

Finally, to emphasise again how far more advanced than our own is the American study of administrative law, here are the titles of the twenty chapters in this book: the administrative process; delegation, subdelegation and interpretation of powers; investigation; supervising, presenting, advising,

declaring and informally adjudicating; interpretative, legislative, and retroactive rules; rule-making procedure, requirement of opportunity to be heard; adjudication procedure; institutional decisions; bias; separation of functions; evidence; official notice; findings, reasons and stare decisis; res judicata; exhaustion of remedies, ripeness and primary jurisdiction; standing to enforce and challenge; forms of proceedings for review; tort liability of governmental units and of officers; non-reviewable action; scope of review.

J. A. G. Griffith.

Power Politics. A Study of International Society. By Georg Schwarzenberger. Second Edition. Published under the auspices of the London Institute of World Affairs. [London : Stevens & Sons. 1951. xxii and 816 pp. Index. Bibliography. £3 10s.]

Students of International Relations have cause to be grateful to Dr. Schwarzenberger for his decision to publish a second revised and expanded edition of Power Politics, first published in 1942. This edition again reflects his wide range of knowledge, his analytical faculties and his balanced judgment.

Dr. Schwarzenberger is foremost among those who regard International Relations not merely or primarily as a study of contemporary events or recent diplomatic history, or of international institutions or law, but of international society, its structure and dynamics, and of the members of that society and their relations to one another in all their manifold aspects. To him it is essentially a field for sociological analysis, to which the related disciplines of history, law, political science and economics should be harnessed. He is well equipped with the basic legal, political and sociological training to undertake such an enterprise. To teachers of international relations the most interesting and valuable portion of this book may well be the introductory chapter, in which he sets out his thesis of international relations as a branch of sociology applied to international society, boldly asserting its claim and suitability as a field for academic study. His insistence on the merits of international relations as a science with a unity imposed by its subject-matter rather than a mere "conglomeration of disjointed pieces of knowledge," or an annex of history or politics, is argued with cogent reasoning, which, at least, should cause those who regard this academic parvenu with suspicious apprehension, to approach the question anew with a more open mind. Nor does Dr. Schwarzenberger lightly ignore the difficulties or dangers inherent in the very complexity of the study. On the contrary he examines them thoroughly and carefully. He admits the existence of the twin perils of dilettantism and tendentiousness, but thinks that their obvious presence serve as "an ever present reminder of the need to be critical of one's own subconscious valuations" (p. 10).

The original impetus to the study of international relations was the emotional shock of the First World War, and the wave of idealism which rose up in its wake. The study of international relations tended to centre on the machinery of international cooperation and it was assumed that the creation of such machinery would succeed in banishing war. Study was concentrated not on international society as it was, but as it ought to be. The events of the thirties destroyed the optimistic assumptions upon which this approach was based, and a more realistic tone began to characterise the study. Dr. Schwarzenberger approaches the subject with the object of examining how States behave in their relations with one another. He applies to the wider field of international relations the inductive method which he has applied to the specialised study of international law.

Broadly, the book is divided into three parts. In the first, Elements of Power Politics, the evolution and structure of international society, and the

patterns of relations and the behaviour of its members are examined. Power in this context is defined as "the mean between influence and force, power distinguishes itself from influence by reliance on external pressure as a threat in the background, and from force by preference for achieving its ends without the actual use of physical pressure" (p. 14). Power politics is defined as "a system of international relations in which groups consider themselves to be ultimate ends" (p. 13). Dr. Schwarzenberger sees the basic trend of international society to be towards the reduction in the number of effective Great Powers, which has reached the contemporary stage of two opposing nuclei. One might perhaps question whether this trend is inevitably bound to continue. It is not outside the bounds of possibility that other centres of major power may gradually emerge. Too great a concentration on contemporary phenomena may conceivably cause us to be surprised by later developments. One immediately thinks of the long-term potentialities of China as a major force in world politics.

The second section is entitled Power Politics in Disguise, which the writer defines as a system of power politics in the cloak of a community (p. 13). Here he examines the emergence of international institutions, universal, regional and functional, and the degree to which, if any, such developments have modified the operation of a system of power politics. His verdict is in the negative. Power politics can only be superseded by a world community, neither the League of Nations nor the United Nations have or could create such a community. And with an almost brutal frankness he writes: "Thus it is complete illusion to imagine that world peace depends on the United Nations. The United Nations depends on peace between the world powers. The problem of how to break the vicious circle of power politics in disguise is still unsolved" (p. 724). Dr. Schwarzenberger is undoubtedly right in emphasising the point that institutions will not of themselves exorcise the operation of power politics but it might be relevant to suggest that the accumulated experience of international organisation may help to create certain patterns of behaviour and a climate of opinion which may make possible that transformation of an international society dominated by power politics into an international community.

In the third part, Dr. Schwarzenberger proceeds to an examination of future trends and to an analysis of the conditions and problems of international planning. He warns against the uncritical acceptance of the principle of gradualness. "If we develop the habits of friendly and peaceful international cooperation it is said, and slowly but surely accustom nations to such laudable practices, then, one day, we shall wake up in an international community" (p. 73). Dr. Schwarzenberger considers a number of possible patterns of planning for the future. Discussing the United Nations Reform Pattern, he brings out clearly the fundamental dilemma of establishing a world order in a system of power politics. To be effective, such an order demands the subordination of the world powers to a universal law, but any attempt to coerce such powers would lead to war. None of the proposals to reform the United Nations is "capable of leading out of the impasse." "They either presume the present relative universality of the United Nations or they postulate by implication the reduction of the United Nations to the status of an international organisation of one of the two worlds" (p. 758). Turning to what he terms the Nuclear Pattern, he distinguishes between Regional and Functional Integration and Federal Integration. Of the first, it takes for granted the impracticability of establishing a world community in the foreseeable future, but it offers no alternative to world power politics, and, it may be added, is only too likely to accentuate international tension. As to the second form, the federal, Dr. Schwarzenberger postulates the minimum requirements of federation, a consideration of which might well be recommended to the supporters of World Government now. In his view the optimum area of federation is smaller than the non-Soviet half of the world,

but larger than the individual areas of the British Commonwealth, the Western Hemisphere or Western Europe. He sees a gleam of hope in the Atlantic Organisation, if it can develop from a primarily military alliance into a more political association based upon the principle of an open community, for otherwise it would degenerate into another of the antagonistic groupings of power politics in disguise.

While it would be possible to disagree with some of the arguments and conclusions expressed in this book, the incisiveness, range and balanced realism of his analysis makes an unique contribution to the study of international relations. Other writers have emphasised the dominant role of power in international society, but their definition of power has been too simple and crude, and they have tended to conclude that it is useless to discuss the emergence of a world community. Dr. Schwarzenberger does attempt to chart the unknown.

This volume will be of value to a general reader as an antidote to the still prevalent wishful thinking about international relations and to the prejudices which may be the more powerful because they are often unconscious. It might also serve as a useful textbook to students of international relations.

Ieuan G. John.

Recent Trends in the Law of the United Nations. A Supplement to "The Law of the United Nations." By Hans Kelsen. Published under the Auspices of the London Institute of World Affairs. [London: Stevens. 1951. 905–994 pp. Index. 10s. 6d. net.]

The Commentary on the Charter of the United Nations presented to Parliament in 1945 by the British Foreign Secretary observed: "The successful working of the United Nations depends on the preservation of the unanimity of the Great Powers. . . . If this unanimity is seriously undermined no provision of the Charter is likely to be of much avail. In such a case the Members will resume their liberty of action" (Cmd. 6666, p. 17). Unanimity of the Great Powers becomes more and more remote as the years go by. Members have perhaps not yet altogether resumed liberty of action, but various attempts have been made to devise means either to supplement the collective security system of the United Nations or to work the whole machinery without its originally designed mainspring. The constitutionality of some of these devices, such as the North Atlantic Treaty Organisation for collective self-defence, the United Nations action in Korea, the extension of the appointment of the Secretary-General by the General Assembly without a recommendation from the Security Council, the Acheson Plan for collective measures to preserve peace, has been examined by Professor Kelsen in the recent Supplement to his penetrating *Law of the United Nations*, already noticed in this journal ((1951) M.L.R., pp. 367–9).

In the main work, even though, as was observed in the previous review, "one may disagree with the . . . static and limited role assigned to the jurist," the author, in his general commentary on the Charter, used with great success the method of presenting all the possible meanings and constructions that might be attributed to the terms and provisions of the text. However, the use of the same method in examining *ex post facto* the legality, in terms of the Charter, of a few specific incidents that have already taken place cannot help developing often an air of artificiality, especially when the author appeared in more than one instance evidently the last person to believe in some of the essayed constructions. The Supplement would have yielded added interest had the author enlarged on what he only touched upon in the Preface, namely, the problem of *de facto* revision of the Charter presented by these

devices. Nevertheless, its detailed analysis constitutes a valuable juridical study of an important chapter in the life of the United Nations.

On a point of detail, it may be mentioned that Professor Kelsen maintains that Article 51 of the Charter, in speaking of the "inherent" right of self-defence, "presupposes the natural-law doctrine. . . . For those who do not accept it Article 51 has, in spite of its wording, a constitutive character. It is this Article which establishes the right of self-defence" (p. 914. *Cf. Law of the United Nations*, p. 792). Judging by both the Chinese and the French texts, the Charter does seem to presuppose the natural-law doctrine. However, even for those who do not accept it, Article 51 may yet be regarded not as constitutive but merely declaratory—declaratory not of natural law but of customary international law. The right exists prior to, and independently of, Article 51 which confirms rather than establishes it. This difference in approach gives a slightly different turn to the interpretation of the provision, probably the one article in the Charter the most referred to in the Supplement.

B. Cheng.

Charles Evans Hughes and the Supreme Court. By Samuel Hendel, Member of the New York Bar, Assistant Professor of Government at the College of the City of New York. [New York: King's Crown Press, Columbia University; London: Oxford University Press. 1951. xii and 337 pp. (with Table of Cases and Index). 30s.]

This book consists of an appreciation of the judicial contribution of Charles Evans Hughes as a member of the Supreme Court, first as Associate Justice, from 1910 to 1916, and then as Chief Justice, from 1930 to 1941. It is not the author's purpose to draw a full life portrait of his subject, although a sketch is given of Hughes' career prior to 1910, as lawyer, public investigator and Governor of New York State, and of his political and legal activities in the years between the time when he resigned from the Supreme Court in 1916 to become the Republican Candidate for the Presidency, and the time when he was reappointed to the Supreme Court by Hoover in 1931 (this time as Chief Justice). Mr. Hendel is primarily concerned with Hughes' contribution to the solution of the important constitutional issues of his day. Above all, the book is an endeavour to assess fairly the work of the man as Chief Justice, and the account of his career prior to his elevation to this high office is mainly directed to providing a proper background and perspective for this assessment.

Hughes was a striking figure in American public life for nearly half a century, and the Supreme Court over which he presided became the centre of controversy in 1935 and 1936, when no less than a dozen decisions were given which were unfavourable to President Roosevelt's New Deal legislation. The crucial role played by Hughes at this time of crisis, first in siding with the more conservative members of his court to invalidate several New Deal measures, and then transferring his allegiance to the liberal side to uphold other New Deal measures, shortly after Roosevelt had produced his scheme to reorganise the court, has been the source of great speculation and debate. What was the true explanation for the Chief Justice's apparent somersault? Did he really see the red light and steer his course accordingly, or were there convincing legal grounds for his differing opinions? Mr. Hendel's investigation throws some light on the matter, but he confesses that "few men have more successfully eluded simple and unequivocal characterisation" (Preface), and his approach, with its rather narrow self-imposed limitations, precludes him from giving us the whole picture. The book also loses clarity by not being entirely chronological in its account, the author having preferred to

group decisions according to subject-matter, no doubt correctly believing that only in this way could the legal bases of the controversial judgments be satisfactorily investigated. Nevertheless, Mr. Hendel does give us some clues which are helpful in the search for answers to the above questions.

In the first place, it is clear that Hughes had a tremendous regard for the dignity and prestige of the Supreme Court, and considered that this depended in no small measure upon the stability of its decisions and the avoidance of close divisions of opinion among its nine members. The desire to avoid too much dissent may have led him to side with the conservatives in invalidating the Agricultural Adjustment Act, while his regard for precedent may account for his attitude in the case of *Jones & Laughlin*, in upholding the activities of the National Labour Relations Board, which is alleged to have been a shift of position on his part. Mr. Hendel believes that Hughes' opinion here "followed logically in the path of his earlier interstate commerce decisions" (p. 265).

Secondly, Hughes brought to the Bench a wide experience of men and affairs, which may have prompted him to make a stand against the tide of reform at a time when many people in the States had begun to fear that it was flowing too fast, and which yet enabled him to recognise the inevitable in time to save the Supreme Court from drastic and possibly disastrous change. The plan to reorganise the Supreme Court was not only defeated in the Senate Committee but made unnecessary by the change of attitude in the Supreme Court, which in consequence emerged from the crisis shorn of none of its powers of review (and incidentally Mr. Hendel would like to see them curtailed).

In the third place, it seems likely that Chief Justice Hughes' name can be linked with that of Chief Justice Marshall. Both were great judicial statesmen. Mr. Hendel is confident that "no other justice, excepting John Marshall, played as vital a part and one so fraught with historic consequences in (American) constitutional history" (p. 280). While it may not yet be possible to pass final judgment upon Hughes' role in the New Deal crisis, it seems clear that it was neither insignificant nor despicable. Mr. Hendel is to be congratulated upon his careful and useful analysis.

J. E. Hall Williams.

Legislation for Press, Film and Radio. By Fernand Terrou and Lucien Solal. [Published by UNESCO.]

The object of this work is to survey the laws in force throughout the world so far as they affect the main methods of mass communication. It is a study in comparative law within a limited field and its appeal is practical rather than theoretical. That is to say that it exhibits the different ways in which similar problems have been approached by different systems of law, without attempting to draw conclusions, but in such a manner that anyone concerned with developments of his own national system may, by seeing how others have proceeded, select what he considers best in each.

The book has two main parts. The first, called "the Code of the Enterprise," deals with those aspects of the different national laws under which the organisation, be it firm, company or institution, which creates and distributes the subject-matter of mass communication, is formed, maintained and controlled. The second, called "the Code of Publication," deals with those aspects of law which relate to rights in and liabilities in respect of subject-matter, the law of libel, the law of copyright and the like. Finally the book deals with "the Code of the Profession," namely laws or regulations governing those whose profession is the production of news and radio or film material.

The first part contains much which is novel and of interest. Two points stand out. There is the contrast between the press and the film on the one hand, which follow the anticipated pattern of enjoying the greatest freedom from control in those countries in which the social and political bias lies most towards free enterprise, and the radio system on the other which, so far as legal forms at any rate are concerned, does not seem to fit the same pattern. The methods adopted of organising broadcasting vary from those permitting free and multiple enterprises, through a medley of systems of independent and quasi-independent monopolies to fully controlled state services, but legal independence does not always go with freedom in other fields. But, as the authors point out, the regulations relating to programmes sometimes impose a greater State control where the broadcasting body is operated by private enterprise than in those in which it is a public institution.

Secondly, there is the development in this field of what is basically a new sort of legal person, namely the independent non-profit-making organisation, enjoying freedom from both State and private control within the limits of its constitution. While the organisation of such a body is no doubt akin to that of the charitable trust which has long enjoyed popularity, the extent of social and political power which is possessed by any body concerned with news communication, particularly where the body possesses a monopoly, makes the development of such entities of high importance. The work under review devotes a good deal of space to the various constitutions of broadcasting enterprises of this nature, and indicates that consideration is given in various countries to the setting up of similar organisations for the press and for news agencies. Having regard to the form and object of the work it may not be legitimate criticism, but while the writers have set out the material from which conclusions may be drawn, they have failed to indicate any conclusions. But this part of the book does challenge reflection. One idea which occurs in contemplating this development is that the real independence of such a body must be proportional to the fearlessness or otherwise of state interference which the common law of the country concerned has inculcated in the individuals who compose the body. A second is to recall that it was a somewhat similar body which "the Sleeper" in Wells' story found in control of the world when he eventually awoke.

The second part of the book seems less satisfactory, probably because it is dealing with less novel material and is attempting to summarise in a relatively small space the laws of many countries which are concerned only incidentally with the subject-matter of the present study.

Possibly the most interesting comparison in this part of the book is concerned with the different systems of establishing individual responsibility for press offences: in some countries a responsible manager has to be nominated, in others there is what is described as the "waterfall" method by which liability can be passed on from one to another, while, in the Anglo-Saxon system, the ordinary law of master and servant applies.

The law of defamation is dealt with at some length but the statement, though possibly qualified by its context, that under Anglo-Saxon law you may libel private individuals but not public servants, seems a little surprising.

There is an interesting observation in relation to copyright law that a work of literature is primarily public property and no more than a remuneration, in the shape of a longer or shorter concession, is due to the man who first gave life to a work which was in essence latent in the community. This puts the opposite side to the argument, more often expressed, that a work of literature is peculiarly the property of the author and that any limitation on such right is introduced either as a consideration for protection given by the State or from the purely practical necessity of putting some term to the right. But the details of copyright law seem to contain certain inaccuracies. It is not correct for example that the law of Great Britain permits the reproduction without the author's consent of articles dealing with current

events. Nor is it correct that the ownership of copyright as between journalist and owner depends upon contract or custom, it depends upon a statutory provision vesting copyright in an employer.

The section dealing with the profession of journalism indicates that few countries possess any special system of law on this subject and the matter therefore rests upon the rules of private organisations.

The value of the whole work lies on its collection in one place of the legal provisions of many countries as they apply to a particular class of enterprise, which has ever-increasing power and influence as modern means of distribution are extended. It may usefully be read by anyone who is interested to learn the manifold ways in which similar problems have been solved or attempted under different forms of government or who is concerned to seek improvements of the law of his own country in this field.

F. E. Skone James.

Probation and Related Measures. United Nations Publications Sales Number 1951. IV.2. [New York : United Nations Dept. of Social Affairs. 1951. xvi and 407 pp. Distributed in this country by H.M.S.O. 22s. 6d.]

It is with a sense of relief that one turns from the increasingly problematic political activities of the U.N. Organisation to the work done by what may be termed its technical departments which have the opportunity and the means to examine a multitude of concrete and definite problems of great practical importance on an international level. This comprehensive comparative study is the first work in the field of prevention of crime and the treatment of offenders to be prepared by the Dept. of Social Affairs at the request of the Social Commission and the Economic and Social Council. It has been able to draw upon communications and reports prepared by numerous organisations and experts in many countries, but the result is much more than a mere compilation. In the field of probation experience of one country may be of immediate practical value to another; *Probation and Related Measures* should prove an essential handbook for anyone concerned with the shaping of penal policy anywhere.

This study is primarily concerned with adult probation defined as a "method of dealing with specially selected offenders, . . . consisting of the conditional suspension of punishment, while the offender is placed under personal supervision and is given individual guidance or treatment." Probation in this sense is described as "essentially an Anglo-American socio-legal institution," for it is only in the English and American practice that supervision has from the outset been closely associated with, indeed essential to, probation, whilst most continental countries, taking their start from the famous draft loi Bérenger, dealt with the conditional sentence as the primary legal institution and considered probationary supervision as an optional adjunct. This distinction is vital, for development in this country and in the United States has been from supervision to actual treatment; probation has in fact undergone a subtle but important change, until it is now, under the Criminal Justice Act, 1948, no longer to be considered as a measure designed to keep out of prison minor offenders and to give them another chance, but an integral part of a penal policy which aims throughout at reformation of delinquents. As one U.S. source here quoted puts it: "Probation is not to be interpreted as leniency or mercy, allowed because the court has been swayed emotionally. It is a form of treatment consciously chosen because there is reason to believe that the interests of society can be protected, while at the same time the needs of the offender can be met in this manner better than in any other."

Unfortunately there has been a tendency in this country among the public at large (and even among some magistrates) to regard probation as almost

equivalent to "being let off" or even to being found "not guilty," a misconception for which the wording of the 1907 Act was no doubt to some extent responsible, for it spoke of "releasing" an offender on probation, and in summary proceedings not only exempted him expressly from the imposition of any sentence but even from conviction. These matters have now been attended to in the 1948 Act, but a marked decline, compared with 1938, in the proportion of offenders placed under the supervision of probation officers and striking fluctuations in the use of probation by different courts suggest that the full possibilities of this measure have yet to be recognised in many cases where a fine or short term imprisonment are now normally imposed.

In order to "strengthen" probation and to render it "more effective" (which might ensure its wider use in this country), it has recently been suggested that in suitable cases the courts might be given power to impose a definite penalty as a warning, but to suspend its execution pending good behaviour over a certain period. This system of conditional suspension of punishment, in contrast to the Anglo-American method of suspending the imposition of sentence, is the one which was adopted by many countries on the Continent at the end of the nineteenth century and is still in force there. The difference is probably not a fundamental one in the sense that it can, by itself, make or mar, like effective supervision and treatment, the success of probation as a measure in the combat against crime, but the UN study considers carefully (on pp. 205–209) the relative advantages and disadvantages of the two methods from the point of purpose and potential scope of effective application. In the end the conclusion is here reached that "the claims of superiority on behalf of suspended execution of sentence . . . rest on rather insecure foundations" and the authors of *Probation and Related Measures* justifiably lay stress on the fact that the imposition of a definite sentence is not altogether in tune with the prevailing view of probation as an essentially non-punitive measure to be used conditionally as an alternative to punishment. A compromise solution is nonetheless by no means here ruled out which would allow the courts to use either alternative in appropriate cases, and this seems to have been practised with success in a number of states of the U.S.A. and more recently in Sweden.

The UN survey has wisely not attempted an exhaustive description of probation legislation and/or practice all over the world. It has instead given a detailed exposition of the present situation in six selected countries (U.S.A., U.K., New Zealand, Norway, Sweden and the Netherlands) and has concentrated on a comparative and critical analysis of problems common to them all. Of paramount importance for the success of probation the authors consider an exhaustive preliminary inquiry into the offender's personality, circumstances and needs as an indispensable foundation of any trial, an inquiry not intended to seek for mitigating factors which might justify conditional release, but as an assessment of the offender's susceptibility to reformative treatment and likely response to a probation order. Such preliminary inquiry, which would ideally include as a matter of routine a medical examination of every offender brought before the court, is in this country already fairly well established for juvenile offenders, but is often only rudimentary in the case of adults. It is encouraging to hear that "the medical, psychiatric and social examination of offenders before final disposition of the case and as a guide to treatment" is the subject of a special detailed study already undertaken by the UN Secretariat in collaboration with the World Health Organisation and other international bodies. Further complementary studies envisaged relate to "experimental projects in probation, the practical results of probation, and the financial aspects of the probation system." There can be no doubt that if these studies are carried out in the same searching and factual spirit as the work now before us, they will form one of the most important and comprehensive contributions ever made to the discussion of this subject. Already it is difficult to imagine how any country

contemplating probation legislation can afford to neglect this carefully compiled and well-documented work whose usefulness is enhanced by ample appendices of statutory texts, thorough indices and by a bibliography covering 284 items of general interest, in which the basic works are specially marked.

H. A. Hammelmann.

The Technique of Advocacy. By John H. Munkman, ll.b. [London: Stevens & Sons, Ltd. 1951. xiv and 173 pp. 17s. 6d. net.]

Advice on Advocacy in the Magistrates' Court. By F. J. O. Coddington, m.a., ll.b. [Chichester: Justice of the Peace, Ltd. 1951. viii and 22 pp. 3s. 6d. net.]

New books on advocacy are rare, at any rate in this country, and a capable piece of work such as that of Mr. Munkman is accordingly very welcome. The author in his Preface makes claims to originality which are not quite borne out by his performance, and is also too scornful of his predecessors whom he tends to write off as negligible, yet some of these he quotes a good deal such as Welldon's useful *Art of Cross-Examination*, and of others he seems curiously unaware such as *Hints on Advocacy* by Harris which though an uneven and in parts prolix work has been the standby of several generations of budding young advocates.

Much the best part of Mr. Munkman's book, and much the longest section comparatively, is that devoted to cross-examination, and this is certainly the best treatment of this most difficult art that I am acquainted with. The points made are admirably illustrated from the classic performances of the leading modern cross-examiners, and any young advocate wishing to make himself proficient in this branch of his work cannot do better than study these chapters carefully.

Nevertheless the percentage of cases won and lost through cross-examination is not large, and the majority of successful advocates do not shine at it: indeed it probably plays no significant part in the majority of cases decided in the courts. Advocacy is essentially the art of presenting a case in such an attractive way as to win it, and this depends much more on thorough knowledge derived from hard work, and orderliness in presentment than on anything else, especially in modern times when, outside the criminal courts, juries are rare. Mr. Munkman is not unaware of these matters, but I do not think that he attaches anything like due importance to them. His chapter on "the Speeches" is hardly a quarter of the length of that on cross-examination, and his chapter on the hardly less important subject of general strategy and tactics, some four pages in length, seems to have been added as an afterthought. Yet how many cases have been won because the advocate knew his judge? And how many more have been lost because advocates did not know their judges? Mr. Munkman seems to think that all judges are Olympians dispensing impartial and objective justice—a pious theory much favoured by the legal profession on formal occasions such as banquets, but which, as every practising lawyer at the end of his first week in the courts knows, does not square with the facts.

Mr. Coddington whose "lighthearted address" to the Bradford Law Students' Society is so full of good things that it was well worth putting into permanent form is fully alive to such essential matters: if you don't know your court "go early if possible, make inquiries of the habitués, and listen to other trials"; golden counsel indeed.

Mr. Coddington's wisdom is specifically addressed to advocates in Magistrates' Courts—he was himself a stipendiary magistrate for many

years—but nearly everything which he says is equally applicable to advocacy in the higher courts. His address is compounded of a mixture of the vital principles of advocacy such as the attainment of clarity by attention to chronology with sage practical tips. He has also been fortunate enough to obtain from Sir Norman Birkett, perhaps the best all-round advocate of our generation, a foreword which is in the nature of a short essay on advocacy and which is a gem of its kind. In it Sir Norman underlines and exemplifies many of the points made by Mr. Coddington and indicates what he regards as the fundamentals of the subject. Three shillings and sixpence might appear to a young man a lot to pay for fewer than thirty pages of print, but not if he reflects that there is hardly a page here which if properly mastered and applied to his work may not win him a case.

C.

Terrell and Shelley on the Law of Patents. Ninth Edition by K. E. Shelley, Q.C. [London : Sweet & Maxwell, Ltd. 1951. lxv and 679 pp. £5 5s.]

Terrell on Patents has for decades been the standard work on this branch of the law, and now that Mr. Shelley has presented a completely revised edition of great excellence it will remain the classical textbook on patent law. Mr. Shelley is one of the leaders of the patent bar and his writing breathes the atmosphere of the courts where patent law is dispensed and made. The emphasis is on court practice throughout. Out of 400 pages of text over 100 pages are devoted to the Action for Infringement, the Petition for Revocation and the Action to Restrain Threats, all of which come within the jurisdiction of the courts. Procedure in the Patent Office is dealt with scantily, but this is deliberate and frankly admitted in the Preface. For the law of trade marks the standard work by Kerly and Lloyd is supplemented by Mrs. Moses' *Trade Mark Practice* at the Patent Office, but the gap on patent practice in the Patent Office and the Patent Appeals Tribunal remains to be filled. It has always been a feature of Terrell to quote verbatim extracts from leading judgments on each topic; this useful method has been followed by Mr. Shelley and quotations from many new important cases decided since the previous edition was published in 1934 have been included.

It goes without saying that the work is based on the Patents Act, 1949, and the various Rules, Orders and Statutory Instruments which accompany the new Act. Most of these Rules and several other statutes affecting patent law have been reprinted in the Appendix, but the following have been omitted for no apparent reason: Development of Inventions Act, 1948, Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, Public Offices Fees (Patents, Designs and Trade Marks) Order, 1940, S.R. & O. 1940, No. 911; the latter is not even mentioned in the text. While the Royal Commission on Awards to Inventors is nearing the completion of its task, a short reference to its functions ought to have been included in the chapter on Crown Use. One page and a quarter on the vital subject of income tax and surtax as they affect patentees is really not enough, even if one concedes that a full treatise on this subject belongs in books on taxation. In the summary on stamp duty the changes in the law brought about by the Finance Act, 1947, have been neglected. On pp. 264 and 370 it is said that a plaintiff who has had to discontinue his action owing to the defendant pleading the existence of a contract containing an unlawful tying clause may commence a fresh action against the same defendant after the offending contract has been terminated and may if successful recover damages for infringements committed while the offending contract was in force. The statement that the patentee can start fresh proceedings after termination of the offending contract is correct, but the old case cited by Mr. Shelley according to which he can

recover damages for the period before termination is no longer good law under section 57 (2) of the Patents Act, 1949.

Apart from these minor points, Mr. Shelley is always correct, lucid, complete and authoritative. The reader and the practitioner will find in his book all they want to know on the patent law and patent practice in the courts as they stand today. In addition, Mr. Shelley has the courage to criticise decisions which in his submission are wrong, and offers constructive criticism on certain aspects of patent law which in spite of the comprehensive reform in 1949 still need changing; see, for example, the problem of the interpretation of claims and the rule as to equivalents on p. 151. On the other hand, Mr. Shelley in his preface gives credit to the beneficial changes brought about by the legislation of 1949, particularly regarding patents of addition and the chance they offer to the patentee to remedy unlucky drafting of his original complete specification or claims. The reviewer shares Mr. Shelley's hope that the changes in the 1949 Act will enhance the value of patents and give the inventor increased confidence in the protection patents afford to his creation. Mr. Shelley's work in turn will be a useful tool in the hands of the lawyer who strives to protect the inventor against infringement of his rights.

PETER MEINHARDT.

PLANNING APPEALS. By HAROLD J. BROWN, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1951. 87 and Tables xv pp. 12s. 6d.]

THERE is always difficulty in envisaging how a statute works in practice, what sort of change is a material change of user, where are the borderlines between the different classes of use to be drawn, how do the claims of national interest control or affect purely aesthetic considerations in town and country planning? These and a host of similar questions can worry both practitioners who are not constantly involved in planning questions and lawyers in universities—whether formally students or not. One answer is to read all the periodical Bulletins of Appeal Decisions. It is not, however, only the less conscientious who will welcome the present book which digests the decisions under various heads, and in addition, gives a good account of the law and practice of planning appeals. Reading it can also make even confirmed opponents of central control pause and think. The decisions make it evident that without the intervention of the Ministry the control of development might have been much more rigid than it is. For anyone wishing to know something of the working of the Town and Country Planning Act who has not already had occasion to make himself an expert this is a welcome and readable book.

J. D. B. MITCHELL.

A GUIDE TO COMPULSORY PURCHASE. By R. D. STEWART-BROWN. [London: Sweet & Maxwell, Ltd. 1951. 76 pp. and Appendices 20 and Tables xiii. 10s. 6d.]

THIS again is not a book for experts, it first appeared as a Current Law Guide. It is a mark of the increased technicality of law that important branches which may affect anyone at some time are not easy to grasp by those who have had only a limited contact. For such is this book intended and it will serve their turn well. It covers the procedure, subject-matter, and effect of compulsory purchase orders. The Appendices summarise the main powers. A great part of it is taken up with the problem of compensation, which has in some respects been simplified of late, and the main principles emerge clearly. Something more might have been said of compulsory "easements" under such

Acts as the Civil Aviation Act, and while no one could expect a book of this sort to enter into the welter of natural justice cases, perhaps some more of the more recent ones might have been mentioned as well as *Franklin's Case* since that presented some features which could distinguish it from ordinary compulsory purchase cases. Again the treatment of the effect of compulsory purchase on leases by reference to cases which were primarily requisitioning cases is not entirely clear. Those are minor defects and it would be unfair not to rate the present book as a reliable and clear guide for which many will have cause to be grateful.

J. D. B. Mitchell.

Clarke Hall and Morrison's Law Relating to Children and Young Persons. Fourth Edition. By A. C. L. Morrison, c.b.e., and L. G. Banwell. Incorporating the Children Act, 1948, and the Nurseries and Child-Minders Regulation Act, 1948, annotated by M. M. Wells, m.a. Revised for this edition by the Editors in collaboration with Joan D. Cole, b.sc. [Butterworth & Co. (Publishers), Ltd. 1951. xxxvi and 615 and 27 pp. 75s. net.]

Handbook of Child Law. Fourth Edition. By John Stevenson and Lawrence Hague. [Sir Isaac Pitman & Sons, Ltd. 1952. xv and 533 pp. 40s. net.]

The new editions of these well-known books incorporate the important legislation of the last few years relating to children, especially the Children Act, 1948, and the Adoption Act, 1950. It is significant of the trend of this legislation that the first of these books, intended principally for use by juvenile court magistrates, should now be nearly identical in content with the second written for the officers of local authorities. They remain, however, different in arrangement and in the selection of provisions for comment.

Both books have proved themselves in practice, but they remain collections of annotated statutes without that systematic account of the law which their titles seem to promise. *Clarke Hall and Morrison* contains a number of excellent, but tantalisingly brief, Introductory Notes. If the authors could be persuaded to expand these notes into an institutional exposition they would help to fill an astonishing gap in our legal literature and ensure an even greater measure of gratitude from all concerned in the administration of the law.

J. U.

Palmer's Company Precedents, Part II, Winding Up. Sixteenth Edition by His Honour A. F. Topham, k.c., ll.m., Bencher of Lincoln's Inn. [London : Stevens & Sons. 1952. xcix and 1144 pp. £6 10s.]

In the April issue of this Review (at p. 266) a hearty welcome was extended to Part I of this invaluable book. Before his untimely death the learned editor was able to complete the work on this second volume with his usual care and skill. In general the changes made are less substantial than in the earlier volume, but the stricter arrangements made by the latest Act regarding Declarations of Solvency, the new Winding-Up Rules, and the minority shareholders' new alternative remedy to winding up in the event of oppression (s. 210), have necessitated some substantial alterations and additions.

It is unhappily indicative of steeply rising prices that this volume, though

nearly 100 pages shorter, costs £1 more than the first volume which appeared only a few months earlier. But, despite its price, it remains indispensable to every company law practitioner.

L. C. B. G.

Russell on Arbitration. Fifteenth Edition. By T. A. Blanco White of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons. 1952. xxxviii and 412 pp. £3 10s.]

It is good to find that someone has at long last taken in hand a complete reconstruction of Russell's authoritative but, in recent editions, badly arranged and confusing book. The work is now expressed not as a commentary on the Act, but in the form of a narrative divided into chapters. In the main the text has merely been rearranged and not rewritten, but the reorganisation of material and the resetting of the type have produced an immense improvement in intelligibility. As a result arbitrators and their advisers should at least be able to find their way about, even if lay arbitrators may sometimes fail to understand what they find. There is still room for further improvement but the learned editor is to be congratulated on a big step forward.

L. C. B. G.

The Income Tax Act, 1952, Annotated. By Miss H. G. S. Plunkett, Barrister-at-Law (formerly one of H.M. Inspectors of Taxes). [Sweet & Maxwell, Stevens & Sons, and W. Green & Son. 1952. 30s].

Current Law Income Tax Acts Service (Clitas). General Editor John Burke, Barrister-at-Law. [Sweet & Maxwell, Stevens & Sons, and W. Green & Son. £3 10s. Subscription for 1952 £1 10s.]

The new Income Tax Act, while it will ultimately be an inestimable boon, presents the profession with a headache until we get used to finding our way about in it. There is, therefore, a very real need for annotated editions of it and, in particular, for Tables of Comparison enabling us to trace the old familiar sections of past Finance Acts in their new guise. To this need the Law Publishers have responded promptly and efficiently.

The first of these books (reprinted from *Current Law Statutes*) is a copy of the Act, with a brief but helpful commentary to each section, references to the appropriate sections of *Konstam*, Tables of Comparison and an Index.

CLITAS, in addition to incorporating the other book, is designed to provide an exhaustive, up-to-date and annotated collection of all relevant Statutes, Bills, Resolutions and Regulations in a convenient loose-leaf form. Since its original publication it has been decided to include optional sections (for which an additional charge will be made) dealing with Profits Tax and E. P. L. The resulting service will be invaluable.

L. C. B. G.

The Juryman's Handbook. By Alec Brown. [London: The Harvill Press, Ltd. 1951. 152 pp. 10s. 6d. net.]

It was a good idea on the part of Mr. Brown to write a handbook for jurymen. There must be many among those called for jury service who take their duties seriously enough to wish for some instruction, and who cannot find any; or who could not do so until this book appeared, for so far as I know it is the first of its kind. It is also a disturbing reflection that during

a period of 10 years' active practice at the bar, during which I was frequently in courts where juries were at work, I never once heard a judge give any advice to a jury as to how they should go about their business, except of course the instructions in the summing up on such matters as the need for confining themselves to questions of fact.

My impression is, however, that what was required was a modest volume in the nature of a pamphlet costing not more than, say, half a crown. It seems to me unlikely that more than a minute fraction of jurymen will be prepared to go to half a guinea for their instruction. And even if I am wrong about that I could hardly advise them to pay so much for Mr. Brown's book, for the amount of honest-to-goodness instruction which they will find in it could in fact have been compressed into a pamphlet of the 30 or 40 pages which I have in mind. The truth is that while there is a good deal of useful information in the book there is much too much repetition, a deal of unnecessary eulogising of the English court system, and a rather wearisome iteration of the usefulness, the necessity, the privilege of jury service.

The most useful chapter in the book, and also the longest, is entitled "The Juror on Duty," and in this Mr. Brown does run over the main points which affect a juryman while he is actually at work in a case, though even this chapter is not free of a substantial amount of moralising. Other chapters which could have been valuable had they been better done are on "Evidence and Avoiding Prejudice in Regard Thereto," and on "Counsel—How to Assess." Two final chapters discuss the spread of the jury system through the British Colonial Empire and through the world generally. There are a number of appendices, some of which contain information likely to interest jurors a good deal, such as those on "Payment of Expenses" and "Qualification for Jury Service."

On the whole, when he is dealing with fact, Mr. Brown is an accurate guide, but there are a number of slips. For example, it is not usual, as suggested at p. 52, for a warder to produce a prisoner in the dock until told to "put up A. B." by the clerk of the court. And Mr. Brown must have somehow hit on an unusual case from which to generalise his statement that it is customary for the court usher to suggest to the jury who should be their foreman. Juries frequently choose their own foreman, but within my own observation they are usually content to pick on the man who first goes into the box, *i.e.*, whose name is called first. At p. 89 there is a badly constructed and misleading paragraph about the right of counsel "to colour their interpretation of the evidence." It is, of course, legitimate for counsel to suggest interpretations of the evidence, and defence counsel may often be rather colourful about it, but it is the recognised duty of prosecuting counsel to remain strictly impartial, and Mr. Brown would have been better employed in pointing this out than in making so misleading a statement. It must often puzzle a jury to find how different is the emotional approach of prosecuting counsel from that of defending counsel, and many a prisoner must have owed his verdict to that fact, for the jury can hardly believe that a pleader who is so lacking in emotion as prosecuting counsel usually is, really believes in his case.

Incidentally, tucked away rather irrelevantly in the chapter on "Counsel—How to Assess," there is one of the most valuable points in the book, that is a section on the importance of note-taking. It is not at all common to see a juryman taking notes, yet in a long and difficult case such a note might be of the greatest help to him and his fellows at the time they were reaching their verdict. If judges were to adopt the plan, as with advantage they might, of beginning jury cases with a short address to the jury as to how they should set about their work, one of the most useful hints they could give would be that juries should take notes, for which purpose they should be provided with paper and pencils.

C.

United Nations Pamphlets: The Impact of the Universal Declaration of Human Rights; The Suppression of Slavery. [Published by UNO and distributed in this country by H.M. Stationery Office. 1s. 9d. and 3s. 9d.]

These two pamphlets of the United Nations are very different in character. The one is enlightened propaganda; the other is pure information. It is the aim of the former to show that the Universal Declaration of Human Rights is a historic act, comparable with Magna Charta, the American Declaration of Independence, and the French Declaration of Rights of Man as a landmark in the struggle for liberty and fundamental freedoms. It is claimed that the Declaration has had a marked impact in the thought and action of individuals and organisations, and in progressive measures, national and international. The paeans which greeted it are certainly impressive verbally. But the uneasy question forces itself: "What does it mean in practice"? Hitherto the States that signed it have refused to adopt any covenant or convention defining some of the rights in any form which would be binding and enforceable. They have resisted any form of implementation which would allow the individual or the group to complain to an international authority of denial of the rights. In view of this attitude, the fact that the Declaration has been translated into 36 languages, that a Human Rights Day is celebrated annually, that UNESCO collects each year festive messages about it, is less convincing. Yet some moral force must be conceded. The Declaration has frequently been cited as a basis of action at the Assembly of the United Nations and by the Special Agencies of the United Nations. Some of its articles have been embodied in the constitutions of new States, and have been taken as a standard in judgments of the International Court and of many national courts.

The second pamphlet is a useful memorandum on the international action which has been taken, since the beginning of the nineteenth century, to put down slavery in any and every form. It deals particularly with the work of the League of Nations. The machinery for the regular collection of information about the problem of slavery was destroyed by the second world war. It needs to be re-established.

N. B.

Books and Publications received :—

Green's Death Duties. Third Edition. By H. W. Hewitt, ll.b. The Treatment of Legacy and Succession Duties revised by O. M. W. Swingland, ll.b. [Butterworth & Co., Ltd. 1952. 75s. net.]

Summary Maintenance and Guardianship Orders. By A Magistrates' Clerk. Oyez Practice Notes No. 30. [The Solicitors' Law Stationery Society, Ltd. 1952. 8s. 6d. net.]

Notes on Juvenile Court Law. By A. C. L. Morrison, c.b.e. Second Edition. 1952. [Published by Justice of the Peace and Local Government Review, Little London, Chichester, Sussex. 2s. 6d. net.]

Contingency Insurance: Some Notes. By. G. L. Watkins, f.c.i.i. Reprinted from Vol. 48 of the Journal of the Chartered Insurance Institute. 2s. net.

Motor Claims Cases. By Leonard Bingham. First Supplement to Second Edition. [Butterworth & Co., Ltd. 1952. Main Work and Supplement, 47s. 6d. net. Supplement alone, 10s. 6d. net.]

Bell's Sale of Food and Drugs. Supplement to the Twelfth Edition. By J. E. S. Ricardo, B.A. 115 pp. [Butterworth & Co., Ltd., and Shaw & Sons, Ltd. 1952. Price, Main Work and Supplement, 40s. net. Supplement alone, 10s. 6d. net.]

Cripps' Compulsory Acquisition of Land. Release 6, April 2, 1952. [Stevens & Sons, Ltd.]

Encyclopaedia of Planning, Compulsory Purchase and Compensation. Vol. 1—Planning. Revision 13—July 1, 1952. Vol. 2—Compulsory Purchase and Compensation. Revision 9—July 1, 1952. [Sweet & Maxwell, Ltd.]

Law and Contemporary Problems: Commercial Arbitration. Part I. School of Law. Duke University. Vol. 17, No. 3. Summer, 1952.

The Law List, 1952. Edited by Leslie C. E. Turner. [Stevens & Sons, Ltd. xxiv and 1901 pp. 25s. net.]

1951 Annual Review of United Nations Affairs. Edited by Clyde Eagleton and Richard N. Swift. [New York: University Press. London: Geoffrey Cumberlege. Oxford University Press. 278 pp. $4.50.]

Proving a Will. By D. R. Le B. Holloway, LL.B. Second Edition. 1952. Oyez Practice Notes, No. 9. [The Solicitors' Law Stationery Society, Ltd. 110 pp. 9s. 6d. net.]

Konstam on Income Tax. Twelfth Edition. Supplement No. 1. September, 1952. [Sweet & Maxwell, Ltd. 24 pp. 5s. net (or £4 10s. with main work).]

"Current Law" Income Tax Acts Service. Release 5. July 31, 1952.

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